

T H E
Present P R A C T I C E
O F T H E
Court of King's Bench,

W I T H
Large NOTES and OBSERVATIONS, from
the best AUTHORITIES, and the RULES
of COURT.

In a METHOD intirely New.

To which are added,
Necessary PRECEDENTS, and a complete TABLE
to the Whole.

By JOSEPH HARRISON, late of
Lincoln's Inn, Esq; Author of *The Practice*
of the High Court of Chancery, in Two
Volumes.

L O N D O N:

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IN SENATE

January 1st 1869

Present [illegible]

Report of [illegible]

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[1]

THE PRESENT
PRACTICE
OF THE
Court of King's Bench.

Of the authority and jurisdiction of this court.

THE court of King's Bench (the jurisdiction of which court is general, and over all *England*) is so called, for that the King is supposed, by the process of the court, to sit there, as he formerly did, and was *anciently* and *ordinarily* exercised in all criminal matters and pleas of the crown, leaving private contracts and civil actions to the Common Pleas and other courts; but it is now divided into a crown side and a plea side, the one determining *criminal*, and the other *civil* causes. The crown side takes cognizance of all criminal matters wherein the king is plaintiff, as all treasons, felonies, misdemeanors tending to the breach of the peace or oppression of the subject, and of all causes prosecuted by way of indictment,

VOL. I. PART I. B dictment,

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dictment, inquisition, or information; and into this court indictments from all inferior courts, and orders of sessions, &c. may be removed by *certiorari*. A rescous may be returned by the sheriff. Inquisitions of *felo's de se*, or *per infortunium interfecit*, are certified hither of course. Attachments for disobeying rules or orders issue out of this court, concerning which disobedience the party shall be examined on interrogatories; and if guilty will be fined at the discretion of the court.

On the plea side this court holds plea of personal actions prosecuted by *bill* or *writ*, as actions

(a) The court of King's Bench had originally no jurisdiction in any action of debt or covenant, unless one of the parties had the privilege of the court, or the defendant was in custody of the marshal, for some trespass or criminal matter; and in that case they had authority to hold plea of any such action, but they could not issue their process against a person who was at large, and hold him to bail in any case of that nature. To supply this defect, in the reign of King Charles II. a clause was introduced in the bill of *Middlesex* and writ of *lat* (which are their first process), called an *acetiam*; whereby the defendant was to answer to a bill, to be exhibited against him in that court by the plaintiff, in a plea of *debt* or *covenant*, as the case happened to be; and by this method they held the defendant to bail in an action, in which otherwise they could have no authority to take bail, and continue to do at this day. *Vide Instr. Cler. part 1. page 31.*

The court of King's Bench may also hold plea, by original writ out of chancery, of all trespasses on the case, trespasses *vi & armis*, replevins, *quare impedit*, &c. but, as it is said, not in *debt*, *detinue*, *covenant*, or *account*.

This



Court of KING'S BENCH.

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This court examines errors (in fact and in law) in other courts; not only in pleas of the crown, but in all pleas real, personal, and mixed, the court of Exchequer excepted. It may reverse a judgment given in the King's Bench in *Ireland*.

The errors of this court, &c. cannot be reversed but in the house of Lords, if by *original* out of Chancery, if by *bill*, in the Exchequer chamber. *Vide Stat. 27 Eliz. cap. 8.*

This court grants an *ha. corpus* to relieve persons *wrongfully* imprisoned; for, upon return of the cause, they may be bailed or discharged, as the court shall think fit.

This court grants *mandamus's* to *inferior* courts to oblige them to do their duty, and *prohibitions* to keep them within their proper jurisdictions.

This court may correct errors in judicial proceedings, and also other errors and misdemeanors extrajudicial, tending to the oppression of the subject. 1 Lord *Raym.* 6.

May punish an inferior magistrate, or officer of justice, for wilful or corrupt abuse of his authority.

Of the judges and officers of this court.

THE judges of the court of King's Bench are the lord chief justice, created by writ, and three other judges, created by letters patent.

By the *Stat. 20 Ed. 3. 1.* The king's justices are to take no fee but of the king.

(a) At the common law the judges patents were determined by the demise of

the king; but by *Stat. 7 & 8 W. 3. c. 27. s. 21.* and *Stat. 1 Ann. Stat. 1. c. 8. s. 1, 2.* such patent is to remain in force for six months next after such demise, unless in the mean time superseded, or made void, by the next and immediate successor to the crown.

The *Stat. 12 & 13 W. 3. c. 2.* enacts, that the judges commissions be *Quamdiu bene se gesserint*, but removeable upon address of both houses (a).

The judges of the King's Bench are the sovereign justices of oyer and terminer, gaol delivery, and of eyre, conservators of the peace, and the sovereign coroners of the land.

The rest of the officers of this court are on the crown side.

(b) *Vide Dyer*
150.

The king's coroner and attorney (b), commonly called the clerk of the crown, or master of the crown office in the court of King's Bench. He holds his place for life by letters patent under the great seal of *Great Britain*.

The secondary of the crown side. He is appointed by writing, under the hand and seal of the clerk of the crown.

Clerks of the crown office are admitted in writing by the clerk of the crown for the time being, for their several and respective circuits or divisions, by his subscribing his name to an entry of an appearance of each clerk, and also to a particular of the counties, cities, and towns, allotted to such clerk for his circuit or division.

The clerk of the rules. This officer is appointed for life, by writing under the hand and seal of the clerk of the crown.

The examiner of the crown office. He is verbally appointed by the clerk of the crown.

The calendar keeper. He holds his office by verbal appointment of the clerk of the crown.

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The clerk of the grand juries. He is appointed by writing under the hand of the clerk of the crown, and holds his place for life.

Officers on the plea side are :

The prothonotary, or chief clerk of the court, who is master of the King's Bench office. This office has immemorially been granted for life or lives, by the chief justice of this court for the time being.

See an antient surrender and grant of the office of chief clerk, T. 36 H. 6. A. D.

The secondary, or deputy to the chief clerk, commonly called the master. He is verbally appointed by the chief clerk.

1458. Res. 36.

The clerk of the rules. This officer holds his place for life, by appointment in writing under the hand and seal of the chief clerk.

Two clerks of the papers. These officers hold their places, by writing under the hand and seal of the chief clerk, for their lives, and the life of the longer liver of them.

The clerk of the doggets, commitments, and satisfactions. He holds his office by appointment, under the hand and seal of the chief clerk.

The clerk of the declarations. This officer holds his place for life, by appointment in writing under the hand and seal of the chief clerk.

The clerk of the common bails, estreats, and postea. This officer holds his place for life, by appointment under the hand and seal of the chief clerk.

The signer of the writs. This officer holds his place by parol appointment of the chief clerk.

The clerk of the treasury, and *custos brevium et recordorum*, formerly called the office of *custas brevium et recordorum*, is an antient office, and an office for life, at the disposal of the lord chief justice of the court for the time being, as ap-

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pears by a general rule of court made *Easter* 4 *Jac.* 1.

The clerk of the *custos brevium* in the inner and upper treasury. This officer holds his office by verbal appointment from the clerk of the treasury.

The clerk of the *custos brevium* in the outer treasury. This officer is appointed by writing, under the hand and seal of the *custos brevium*.

Three clerks of *Nisi prius*. They are verbally appointed by the *custos brevium*.

The signer of the bills of *Middlesex*. This officer is appointed in writing by the three puisne judges.

The clerk of the errors. This officer is verbally appointed by the lord chief justice for the time being.

The master of the seal office, the most noble duke of *Cleveland*.

King *Charles* II. by letters patent under the great seal of *England*, granted this office to the most noble *Charles* late duke of *Cleveland*, then earl of *Southampton*, and his heirs male, in default of issue male of lord *George Fitzroy*, since deceased without issue male, under certain yearly rents to the amount of 631 *l.* 10 *s.* The present duke of *Cleveland* came into possession of this office, by virtue of the said letters patent, on the death of his father the said *Charles* duke of *Cleveland*, and exercises the same by his deputy.

The clerk for transcribing from the plea rolls the records of *Nisi prius* for *Middlesex*. This officer is appointed by the chief justice for the time being.

The judges clerks. They are verbally appointed by the respective judges whom they serve.

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The filazers. They hold their places for their lives, by appointments under the hand and seal of the chief justice of the court for the time being.

Usher and cryer, formerly called cryer and porter. He holds his office for life by letters patent under the great seal of *Great Britain*, and executes his office by two deputy ushers, and two deputy cryers, whom he appoints by writing under his hand and seal, for their lives.

Deputy court keeper. He is appointed by the cryer and usher.

The keeper of *Westminster Hall*. He is appointed by the warden of the *Fleet*.

Note; Neither the deputy court keeper, nor keeper of *Westminster Hall*, are apprehended to be officers of the court, and therefore intitled to no fees from the suitors of the court on trials at *Westminster*.

The marshal of the King's Bench prison is *John Ashton*, esq. By Stat. 8 & 9 W. 3. it is (*inter al'*) enacted, that from and after the first day of *May* 1697, the office of marshal of the King's Bench prison should be executed by the person or persons to whom the inheritance of the said prison, prison house, lands, tenements, and other hereditaments, of the said prison, should then belong, in person, or their sufficient deputy or deputies, for whom they should be answerable; and the profits and inheritance be sequestered to make satisfaction for escapes, &c.

The said *John Ashton* formerly held this office by lease for a certain number of years, determinable on his death, and was admitted by the court upon the said lease, and took an oath of office. But at this day, by Stat. 27 G. 2. c. 17. the power of appointing the marshal of the

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King's Bench is in the crown unalienable. For more concerning the marshal, see the *Stat.* of the 27 G. 2. c. 17. at large.

The deputy marshal. He is verbally appointed by the said *John Ashton*.

The clerk of the papers of the King's Bench prison. He holds his place for life, by writing under the hand and seal of the marshal.

The chaplain of the King's Bench. He enjoys this office for life, by appointment of the marshal.

The clerk of the day rules of the King's Bench prison holds this office for life, by like appointment.

There are two turnkeys belonging to the said prison.

The four tipstiffs, one attending each judge of the court. They are appointed for life, by writing under the hands and seals of the proprietors of the inheritance of the said prison.

The associate and marshal at *Nisi prius* in *London* and *Middlesex* is verbally appointed by the chief justice of the court for the time being.

The clerk of *Nisi prius* for trials in *London* and *Middlesex* is verbally appointed by the chief justice for the time being.

The cryer at *Nisi prius* in *London* and *Middlesex* is also verbally appointed by the chief justice of the court for the time being.

There are also commissioners for taking affidavits in the country. See *Stat.* 29 Car. 2. c. 5. s. 2, 3. and also commissioners for taking bails. See *Stat.* 4 W. & M. c. 4. s. 1, 2, 3.

Attornies

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Attornies of the court.

BEFORE *Stat. West. 2. 13 Ed. 1. 2. 10.*
all attornies were made by letters patent
under the great seal. But now *vide Stat. 2. G.*
2. c. 23. for the better regulation of attornies
and solicitors. *Stat. 12. G. 2. c. 13. 22. G. 2.*
c. 46. Stat. 30 G. 2.

Cannot force an attorney to act as such against
his will.

One cannot retain an attorney in a cause
wherein another was formerly retained, without
acquainting the attorney first retained, or the
secondary in the office.

Nor change his attorney without good cause,
and leave of the court; but in this case the at-
torney ought to be first paid his fees, and he
may refuse to deliver up his client's writings
and papers to such new attorney, or his client,
till his bill is paid.

If an attorney in a cause die, pending the
suit, the attorney on the other side may pro-
ceed, if the party, whose attorney is dead, has
notice thereof, and will not proceed.

Attornies, in their common way of practice,
are to be governed by the master of the office.

An attorney is not bound to discover, and
give in evidence, the contents of a deed shewn
to him by his client, nor any letters received
from his client, nor any instructions given him
by his client, unless he will.

An attorney of this court, paying 2 s. a term
to the clerk of the declarations, may file bills
and declarations, and inspect and examine the
files gratis.

An

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An attorney although he doth not practise, yet he shall have his privilege so long as he continues an attorney upon record. *Lutw.* 1667.

Direction for the taxing of bills by 2 *Geo.* 2. c. 23. *sect.* 23. not to extend to cases between attorney and agent. 12 *G.* 2. c. 13. *sect.* 16.

For more concerning attornies, see proceedings by and against attornies.

Michaelmas term hath four returns.

By original.

1. On the morrow of *All Souls*.
2. On the morrow of *St. Martin*.
3. On the octave of *St. Martin*.
4. From the day of *St. Martin* in 15 days.

By bill.

- On () next after the morrow of *All Souls*.
- On () next after the morrow of *St. Martin*.
- On () next after the octave of *St. Martin*.
- On () next after 15 days from the day of *St. Martin*.

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I. On the octave of St. Hilary.

2. From the day of St. Hilary in 15 days.

3. On the morrow of the purification of the blessed Virgin *Mary*.

4. On the octave of the purification of the blessed Virgin *Mary*.

On () next after the octave of St. Hilary.

On () next after 15 days from the day of
St. Hilary.

On () next after the morrow of the purification of the blessed Virgin *Mary*.

On () next after the octave of the purification of the blessed Virgin *Mary*.

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fication of the blessed virgin Mary. () NO

no)
to women and girls and
children.

10 () 1861. THE WOMAN OF THE

After

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By original.

Easter term has five returns.

1. From the day of *Easter* in 15 days.

2. From the day of *Easter* in three weeks.

3. From the day of *Easter* in one month.

4. From the day of *Easter* in five weeks.

5. On the morrow of the ascension of our Lord.

On () next after 15 days from the day of *Easter*.

On () next after three weeks from the day of *Easter*.

On () next after one month from the day of *Easter*.

On () next after five weeks from the day of *Easter*.

On () next after the morrow of the ascension of our Lord.

On () next after the octave of the Holy Trinity.

On () next after the morrow of the Holy Trinity.

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Trinity term hath four returns.

1. On the morrow of the <i>Holy Trinity</i> .	On () next after the morrow of the <i>Holy Trinity</i> .
2. On the octave of the <i>Holy Trinity</i> .	On () next after the octave of the <i>Holy Trinity</i> .
3. From the day of the <i>Holy Trinity</i> in 15 days.	On () next after 15 days from the day of the <i>Holy Trinity</i> .
4. From the day of the <i>Holy Trinity</i> in three weeks.	On () next after three weeks from the day of the <i>Holy Trinity</i> .

Observations

Court of KING'S BENCH.

Observations on the terms.

HILARY term begins Jan. 23, except it happens on *Sunday*, then on the *Monday* following, and ends *February* the 12th, if not *Sunday*, then on the *Monday* following.

Easter term always begins *Wednesday* fortnight after *Easter-day*, and ends on *Monday* before *Whitsunday*.

Trinity term always begins on the *Friday* after *Trinity-Sunday*, that day being appointed by the Stat. 32 H. 8. c. 21. and ends the *Wednesday* fortnight after, unless it happens to be the 24th of *June*, the feast of St. *John* the Baptist, which is no court day, then it must be adjourned to the next day. See *Cro. Jas. p. 16.* 2 *Bulstrode* 242.

Michaelmas term, by Stat. 24 G. 2. c. 48. begins on *November* 6, except it happens on a *Sunday*, then on the *Monday* after, and ends *November* 28, if not *Sunday*, then the 29th.

The issuable terms are *Hilary* and *Trinity*.

There are no sittings in *Westminster-Hall* on *Ascension-day*, *Midsummer-day*, and the second of *February*.

The *Exchequer* opens eight days before any term except *Trinity*, before which it opens but four days.

The first and last days of every term are the days of appearance.

Observations

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Observations on the returns of writs.

Dies non juridici.

ALL Non-judicial days must be avoided, as *Sundays*, the feast of the purification in *Hilary term*; *Ascension-day* in *Easter term*, and *Midsummer-day* in *Trinity term*, if it so happen, (unless it happens on *Friday* next after *Trinity Sunday*, for then it is *dies juridicus* by *Stat. 32 H. 8. c. 21.*) and writs returnable on any of these days are not good.

But see *Stat.*
16 Car. 1. c.
6.

The 11th day of *November*, being the feast of *St. Martin* in *Michaelmas term*, cannot be said to be in or upon any return; and if a writ be returnable on that day, it must be returnable on *Thursday* the feast of *St. Martin*, or any other day of the week it falls on; and if returnable the day after, it must be on *Friday* the morrow of *St. Martin*.

In this court every bill of *Middlesex, Lat'*, *alias capias, pluries capias, distringas, habeas corpus super cepi corpus*, and *habeas corpus ad faciend' & recipiend'*, to do and receive, must be returnable at days certain, as on *Monday* next, &c. and may be returnable on an *essoin* or general return day in *Term* time, but then the day of the week must be expressed, as on *Friday* in one month, &c. But this is seldom used but upon trials and writs of inquiry, in order to get some advantage in that term. If the *essoin* day happens on a *Sunday*, your writ must be returnable on the *Monday* after, viz. on *Monday* next after, &c.

All writs of *capias, alias* and *pluries*, grounded upon originals out of chancery, and all writs subsequent thereto, to the outlawry, writs of
scire

scire facias, quare executionem, & audiendum errores, upon writs of error out of the Common Pleas, or other inferior courts, writs of *capias ad satisfaciendum, fieri facias*, and other judicial writs after judgment affirmed, *retorno habendo, capias in Withernam*, and all other writs and process, grounded upon any *recordari facias loquelam, audita querela, accedas ad curiam, capias si laicus*, and every other judicial writ out of chancery, must not be made returnable on a day certain, but on a general return or escoin day, *ubicunque*, as from the day of *Easter* in 15 days, wheresoever we shall then be in *England*.—There must be 15 days between the *teste* and return of such writs.

But all writs and process in *personal* actions, having day from *tres Michaelis* until *crastino animarum*, shall be good and effectual in the law, notwithstanding there be not 15 days between the *quarto die post* of *tres Michaelis*, and the escoin day of *crastino animarum*. Stat. 16 Car. 1. c. 6.

In all *personal* actions, and all actions by ejectment brought by original, there need not be 15 days between the *teste* and return of any writ or writs of *venire facias, habeas corpora juratorum*, or *distringas juratores, fieri facias*, and *capias ad satisfaciendum*, and the want thereof shall not be error, except the *ca. sa.* whereon an exigent after judgment is to be awarded, or against the defendant, to make the bail liable. 13 Car. 2. Stat. 2. c. 2. s. 7, 8.

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Of actions and arrests.

First : In what cases an action will lie.

AN action will lie for all injuries done to a man's person, reputation, or property, and for every right he is to have a remedy (a).
 (a) Where a person has several remedies he may chuse which he will. 1 *Inst.* 145. *Style* 4.
Bac. Abr.

Where there may be *damnum absque injuria*, no action lies; as if I retain a master in my house to instruct my child, though this be to the damage of a common master of a school, yet no action lies. *Bacon's Abr.*

Secondly : For whom, and against whom, an action will lie.

IN all actions there must be a person able to sue; and no persons are excluded from bringing an action, except on account of their crimes or their country, as after mentioned.

The party sued must be one suable for the thing laid, and the plaintiff must bring his right and proper action, which the law gives him for relief, and lay it in the proper county. *Vide tit. Venue.*

A man that has a special and limited property in goods, as a carrier that has goods delivered to him; a sheriff who has levied goods; a bailiff who has goods in his keeping, &c. shall have

have actions against strangers that take them away, because they are answerable in damages to the owner. *Bac. Abr.*

An infant may *sue* by his *procchein amy* (*i. e.* A general admission of a next friend) or *guardian*, because the law supposes where he sues it is for his benefit, but he must always *defend* by *guardian*. — An infant is not to appear by attorney in his own right, neither may he *sue* or be sued as executor, tho' joined with others, by attorney (*a*), for the infant's disability is adherent to his person; and the reason why the law will not allow of his *prosecuting* or *defending* his right by attorney is, that though the attorney should act contrary to his warrant, he is not answerable for it; whereas in such case the infant has his remedy against his guardian, and also because the infant has no power by law to make an attorney. The law regards the act of an infant as an executor, because he is liable to a *devastavit*. And if an action be brought against three several defendants, and one of them is an infant, they may not all appear by attorney, but he within age must appear by guardian, and the rest by attorney, or it will be error to reverse the judgment. — If an infant sues in another's right, as executor or administrator, and judgment be given against him, he himself may assign his suing by attorney, and not by guardian, for error, because of the personal prejudice he receives thereby; but defendant cannot assign it for error. — An infant, defendant in ejectment, appeared by attorney; this ought not to be assigned for error, for he comes in of his own accord, and prays to be made defendant, which the plaintiff cannot oppose. But *Cur.* directed the record to be amended, and the defendant made to appear by

procchein amy is sufficient. *Str.* 304.

Fitz-Gib.

rep. 1.

(*a*) *Vide Str.* 787.

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by guardian. *Hil. 3 G. 1. Str. 33.*—An attorney undertaking to appear for defendant, an infant, is obliged to do it in a proper manner, and having entered *per attornatum*, when it should have been *per guardianum*, it may be amended, *M. 5 Geo. 1. Ibid. 114.* But appearance of an infant by attorney was held not amendable, there being no express undertaking by the infant's attorney to appear. *T. 1 Geo. 1. Ibid. 445.*

Thirdly: Who are disabled to sue.

ONE attainted of treason or felony, convict of recusancy, convict of *præmunire*, persons outlawed or excommunicated, alien enemies, persons in orders in the papal religion, as friars, monks, &c. cannot maintain an action till pardon, &c. though they may be sued. But executors or administrators, being outlawed, may sue in right of their testator or intestate.

A feme covert cannot sue or be sued without her husband (though the baron may in several cases maintain an action without his wife), except in *London*, by the custom of which place, a feme covert trading there, may sue and be sued as a feme sole merchant. But a wife, for her own crimes, may be indicted without her husband, and she may sue and be sued without him in the spiritual court, and the baron cannot stay proceedings.

*Vide Str. 576.
1 Roll Rep.
426.*

Fourthly:

Fourthly : Within what times actions are to be brought.

ALL actions of trespass *quare clausum fregit*; all actions of trespass, detinue, trover, replevin, account, (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants); all actions upon the case (except for slander), actions of debt, grounded upon any lending or contract, without specialty, and actions of debt for arrearages of rent, are to be brought within *six* years after the cause of action accrues.—Actions of assault, menace, battery, wounding, or imprisonment, within *four* years; actions upon the case for words in *two* years after the words spoken. *Stat. 21 Jac. 1. c. 16. sect. 3.*

If any person intitled to any of the above actions shall be, at the time of such cause of action accrued, *infant, feme covert, non compos mentis, imprisoned, or beyond the seas*, such person shall be at liberty to bring the same actions, within such times as are before limited, after their being at *full age, discover, of sane memory*, at large, and returned from beyond the seas. *Same Stat. sect. 7.* — Note; since the Stat. of limitations all actions seem to be *temporary*, or not so *perpetual*, but that they may in time be prescribed against. *The Stat. of limitations will not run against an action on a bill where plaintiff is beyond sea*: The plaintiff brought an action upon a bill of exchange, to which the defendant pleaded the Stat. of limitations, and the plaintiff replied himself *beyond sea*; to which defendant demurred. Obj. that no actions on

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the case are within the *proviso*, but actions on the case for words; and cited *Cro. Car.* 245. *Show.* 98. Answ. that where the words of a Statute are general, they are to be understood in that sense. 10 *Co.* 101. It is impossible to think so trifling an action as for words should be saved, and not those which are founded on a contract; besides, it has been determined, that the *proviso* extends to this case. 2 *Saund.* 120. 2 *Mod.* 71. *Lutw.* 244. *Et per cur'* judgment for the plaintiff. T. 3 G. 2. *Rochtschilt v. Leibman.* Str. 836.

Fifthly: Of arrests, in what cases, &c.

NONE are to be held to special bail in a superior court under 10*l.* nor in an inferior court under 40*s.* and if the cause of action shall not amount to 10*l.* or 40*s.* respectively, defendant is only to be personally served *within jurisdiction of the court*, with a copy of the process. Stat. 12 G. 1. c. 29. (a) Where the cause of action amounts to 10*l.* or 40*s.* respectively, affidavit (b) must be made and filed of the cause of action, which may be sworn before a judge commissioner of the court (c), or the officer who shall issue such process, or his deputy, and the sum, specified in the affidavit, is to be indorsed on the back of the process; and for which sum the sheriff is to take bail, and for no more. *Same Stat. sect. 2.*

(a) Made perpetual by Stat. 21 G. 2.

§. 3.

(b) If a Quaker, affirmation.

(c) Affidavits of any cause of action, before process

sued out, may be sworn before a proper commissioner, although attorney for the plaintiff. E. 15 G. 2.

No special writ nor process, specially expressing the cause of action, shall be issued where the

the cause of action does not amount to 10*l.* and 40*s.* respectively, and all proceedings on such special writ shall be void, and the attorney or officer, suing forth or issuing such process, shall forfeit 10*l.* to the person aggrieved. *Stat.* 5 G. 2. c. 27. *sect.* 5. made perpetual by *Stat.* 21 G. 2. c. 3.

The act requiring affidavit of 10*l.* due, in order to hold to bail, does not supersede the act of 11 & 12 W. 3. c. 9. which requires affidavit of 20*l.* in *Wales*, and counties palatine. *M.* 12 G. 2. *Str.* 1102. *Vide* 2 *Barnes's Notes* 62.

The day and year of signing process is to be set down thereon. *Stat.* 5 & 6 W. & M. c. 21. f. 3. *Stat.* 9 & 10 W. 3. c. 25. f. 42. and the name of the attorney wrote on every writ or process, and writ of execution and the warrants thereon. *Stat.* 2 G. 2. c. 23. f. 23. made perpetual by 30 G. 2. c. 19. f. 75. But by *Stat.* 12 G. 2. c. 13. f. 4. the not subscribing the attorney's name on the warrant shall not vitiate, provided the writ, &c. be regularly subscribed, and the sheriffs are thereby obliged to subscribe the attorney's names on warrants, on penalty of 5*l.*

No special bail is required in debt on a judgment, unless the debt or damages, *without costs*, amount to 10*l.*

No persons are to be arrested in actions on penal statutes, nor in covenant, unless by rule of court, or the covenant be for payment of money, nor in actions against bail on the bail bond, nor in trespass, battery, wounding, false imprisonment, *privilege*, (except for fees) or slander of title, unless by order of court, or warrant from a judge. Nor in account, till judgment *quod computat.*
Law of arrests.

A defendant lawfully delivered from an arrest shall not at the same time be again arrested plaintiff

at the suit of the same plaintiff. Attorney or plaintiff offending, the attorney to be struck off the roll, and both to be further punished as to *Cur.* shall seem just. *Rule M. 15 Car. 2. in B. R.*

Sixthly: What persons are not liable to be held to special bail in civil cases.

PEERS of the realm, nor their servants, members of parliament or convocation, nor their servants, in the time of parliament or convocation, and for certain days before and after (a). Ambassadors nor their servants; (a) A suit in any court of record or equity may be commenced against a peer, member of the house of commons, or their servants, or any other persons intitled to privilege of parliament, immediately after the dissolution or prorogation of parliament, until a new one meets, and immediately after the adjournment of both houses for above 14 days till they re-assemble. And if any person have cause of action or complaint against a peer, after such dissolution, &c. he may have such process out of the *K. B. C. B.* and exchequer, as he might have had out of time of privilege; and against any knight, citizen, or burgess, or other person intitled to privilege of parliament, after dissolution, &c. by summons and distress infinite, or by original, bill and summons, attachment, and distress infinite, until they enter a common appearance, or file common bail; and any person, in the times aforesaid, may exhibit a bill against any peer, &c. in the chancery, exchequer, or duchy court, and proceed thereupon by letter of *subpoena* as usual, and upon leaving a copy of the bill with the defendant, or at his last place of abode, may proceed thereon; and for want of appearance or answer, or for non-performance of any order or decree, may sequester the estate of the party, but shall not arrest the body. And where a plaintiff is stayed by privilege of parliament, he shall not be barred by the Stat. of limitations (a). And no suit against the king's original and immediate debtor, or against any person liable to render an account to his majesty for any part of his revenues, or other original and immediate duty, or the execution of such process shall be impeached or delayed by privilege of parliament; yet so that the person of such debtor, being a peer, shall not be arrested; or being a member of the house of commons, shall not be arrested during his privilege (b). *Stat. 12 & 13 W. 3. c. 3. 11 G. 2. c. 24.*

(a) See *Stat. 2 & 3 Ann. c. 18.*

(b) *Vide postea, p. —*

also

also corporations and companies. The king's servants (unless leave is granted by the lord chamberlain). The lord mayor of London. Persons attending upon any of the king's courts at Westminster, upon any business there, are also to be free from arrests; as the judges and their necessary servants, clerks, and attornies, &c.

An heir, executor, or administrator (a), sued as such, cannot be arrested, but must be served with a copy of the process. No *acetiam* to be inserted against heirs, executors, or administrators. *Rule M. 15 Car. 2. in B. R.* — But in *C. B. Hil. 12 Ann.* in an *anon.* case, the three prothonotaries declared, that formerly there was no other way of proceeding against an heir, but by summons, &c. but that of late years the practice had been otherwise; and that an heir might be arrested upon a *clausum fregit*; and so held by the whole court; and that he need not be named in the writ as heir. *Vide Rep. and Ca. of Practice in C. B. p. 8.*

(a) Special bail shall not be put in by an executor or administrator, upon a bare suggestion of a *devastavit*; *secus*, if in debt upon a judgment the sheriff returns a *devastavit*. *Carth. 264. Comb. 206.*

A bankrupt is free from arrest in going and coming to surrender to the Commissioners, and from actual surrender, for 42 days, or such further time as shall be allowed to finish his examination, provided he was not in custody at the time of surrender; and if he be arrested for debt, or on any escape warrant, coming to surrender, or after his surrender, within the time before-mentioned, then, on producing the summons, or notice, under the hands of the commissioners or assignees, and giving the officer a copy thereof, he shall be discharged; and if any officer detain such bankrupt, he shall forfeit to the bankrupt, for his own use, 5*l.* for every day he detains him; and if any commission of bankruptcy shall issue against any person, who

who shall have been discharged by virtue of this act, or shall have compounded with his creditors, or delivered to them his effects, and been released by them, or been discharged by an act of insolvency, then the body only of such person shall be free from arrest and imprisonment, but the future estate shall remain liable to his creditors, (the tools of trade, necessary household goods, and necessary wearing apparel, of such bankrupt, and his wife and children, excepted), unless the estate of such person produces clear 15*s.* in the pound. *Stat. 5 G. 2. c. 30.*

Persons who list themselves to serve on board any ship of war, shall not be taken out of the service by any process or execution (except for criminal matters), unless for a real debt, or other just cause of action, amounting to 20*l.* of which affidavit must be made before a judge of the court, or some person authorized to take affidavits, a *memorandum* of which oath to be marked on the writ, for which *memorandum* or oath no fee to be taken; and if any person be arrested contrary hereto, the judge of the court, on complaint of the party or his officer, may examine the same, and by warrant discharge such seaman without fees, upon proof, that he was belonging to one of his majesty's ships, and arrested contrary to this act, and to award costs, for the recovery whereof he shall have the like remedy, that the plaintiff might have had for his costs. But any plaintiff, on notice first given in writing of the cause of action to such seaman, or left at his last place of residence before his entering into the service, to file a common appearance in an action for any debt, so as to proceed to judgment and outlawry,

lawry, and to have execution, other than against the body. *Stat. 1 G. 2. c. 14. s. 15, 16. 31 G. 2. c. 10. s. 27.*

The same with respect to a volunteer soldier, only that the original debt, for which he may be arrested by process or execution, must amount to 10*l.* *Stat. 19 G. 2. c. 11.* See last act for punishing mutiny, &c.

If a person procure another to be arrested in the *Marshalsea*, or in any court within *London*, or in any city, borough, town, corporation, or other place, where any liberty is used to hold plea in personal actions, at the suit of any person where there is no such person known, or without the plaintiff's consent; every person who shall so procure any arrest, &c. and shall be accused by indictment, presentment, or by the testimony of two witnesses, or other due proof, shall suffer six months imprisonment; and, before he shall be discharged, shall pay to the party arrested or attached, treble costs; and also to forfeit to such person, in whose name he shall procure such arrest, &c. if there shall be such person known, 10*l.* *Stat. 8 Ed. 6. 2. s. 4.*

Seventhly : In what cases distinct things may be laid in the same action, et econtra.

DEBT on an obligation, and on a *mutuatus*. Debt and detinue. Debt upon a lease, and for clothes. Several wrongs and trespasses. Several actions on the case, where the case is of the same kind; as an action for fraud on the delivery of goods, and on the warranty of the same goods, being both on the contract; so against a common carrier on the custom of the realm, and trover, because both on the tort. For entering plaintiff's house, breaking his chests, and carrying away his goods, and for beating his servant, *per quod servitium amisit*; for a general action of trespass, and a special action upon the case, may be joined. Where one has a right to recover in the same kind of action, though he derives his right from different titles, yet being conjoined in him he may recover in one action. But one cannot in the same action join a demand in his own right, and that which he has in the right of another. Several persons may join in one action where their interest is joint. But debt and account, debt and trespass, action upon a tort, and upon a contract, *assumpsit*, and trover, may not be laid in the same action. *Bac. Abr.*

Before we proceed to the practice of the court, please to observe, that the courts at *Westminster* will take conuzance of no action, where the debt appears by the plaintiff's own shewing to be under 40*s.* but this is evaded by declaring for 40*s.* or upwards, though the debt is not 5*s.*
But

But if plaintiff should declare for less than 40*s.* defendant may demur to the declaration.

In the Common Pleas, motion to stay proceedings, the plaintiff's demand appearing to be no more than 18*s.* Rule to shew cause. Plaintiff said defendant should plead to the jurisdiction. Defendant's counsel said the King's Bench had stayed proceedings in the like case. *Cur'* said plaintiff might amend his declaration, and increase his damages, and that the King's Bench had determined so; adjourned. Defendant's counsel undertaking to produce the rule in the case he quoted in the King's Bench. *T. 5 & 6 G. 2. Whitehead v. Price. Pract. Reg. C. P. 245. Rep. & Ca. of Pract. C. P. 74. S. C.* says the rule *nisi* was discharged, because the plaintiff may amend his declaration, on application to the court, and set all right.

In the court of *C. P.* an action of debt was brought for 20*s.* for a year's rent; the *damages* were laid 100*s.* Motion to stay the proceedings, because the action was beneath the jurisdiction of the court; but *cur'* refused to make any rule, the *damages* being laid as before-mentioned. *M. 6 G. 2. Mathews v. Holtam. 1 Barnes's Notes 196. Rep. and Ca. of Pract. C. P. 79. S. C.* says the *ad dampnum* gave the court jurisdiction, that if it had been necessary, the court might permit plaintiff to add a new count.

In the same court, motion to stay proceedings, for that plaintiff's demand was only 6*s.* 6*d.* which by affidavit appeared; but, *declaration not produced*, *cur'* made no rule, because the court never tries the *quantum* of plaintiff's demand by affidavit. *M. 12 G. 2. Downes v. Nichols.*

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Nichols. 1 *Barnes's Notes* 196. *Pract. Reg.*
C. P. 246. S. C.

By *Stat. 3 Jac. 1. c. 15.* it is provided, that if one citizen of *London* sue another out of the jurisdiction, and does not recover 40*s.* he shall not only lose his own costs, but shall also pay to the defendant so much ordinary costs, as such defendant shall justly prove it hath cost him in defence of the suit. In this case the verdict was for less than 40*s.* and *Cur'* gave defendant leave to suggest (a) it on the record, as the only way to get at his costs. And a suggestion being made, and a demurrer put in to it, which was adjudged for the defendant, the *Q.* was, whether the costs of the application should be allowed, or only costs of the trial and the former proceedings, this not being, strictly speaking, costs of the defence. But *Cur'* ordered the costs of the whole to be taxed. *M. 13 G. 2. Hickman v. Colley.*

(a) See *Str.*
46.

After the inquest is taken by default, defendant can make no suggestion on the roll, pursuant to *Stat. 3 Jac. 1. c. 15.* *H. 3 G. 1. Brampton and Crabb. Str. 46.*

Affidavits (a).

(a) Affidavit
of belief of a
debt is not

sufficient (b). *Str.* 1209, ~~22~~26. An old affidavit is not sufficient to hold to bail; and where the plaintiff, on going abroad, made affidavit, 4 July, 1744. that the defendant was indebted to him in 277 l. 16 s. 6 d. for goods sold and delivered. On this affidavit process was taken out 9 May 1747. and marked for bail. But *Cur'* ordered defendant to be discharged on common bail; for though he owed so much in 1744. he might not owe it in 1747. and the act requires an oath of a subsisting debt at the time of suing out the process. *T.* 21 G. 2. *Collier v. Hague.* *Str.* 1270. — The act of 12 G. 1. c. 29. requiring affidavit of 10 l. due, does not supersede the act of 11 W. 3. which requires affidavit of 20 l. in counties palatine. *Str.* 1102.

(b) The Stat. requires a full oath. *Str.* 1157.

The forms of divers affidavits, in order to hold defendant to special bail.

An affidavit for work done, and materials found.

King's Bench,

A. B. plaintiff.

C. D. defendant.

A. B. of ——— (a) carpenter, the plaintiff (a) Note; the true place of abode, and the true addition of every person that makes affidavit in this court must be inserted in such affidavit. *Rule M.* 15 *Car.* 2.
in this cause, maketh oath, that the defendant C. D. is justly and truly indebted to him this deponent, in the sum of ———, for work and labour done and performed by this deponent, (or this deponent's servant, or both, as the case shall be); and for materials about the said work and labour, by this deponent found and provided.

A. B.

Sworn the ——— day of

——— 1757. before

———

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If the affidavit be sworn before a commissioner, say,

Sworn at ——— [naming the place] the
——— day of ———, in the year of our
Lord ———, before ———, a commissioner,
&c.

If the cause of action be for goods sold, say,

——— for goods sold and delivered by this
deponent to the said C. D.

If only for one thing, as for a gelding, say,
for a gelding sold and delivered by, &c.

*Affidavit for goods sold and delivered, where
there are several plaintiffs.*

——— indebted to him this deponent, and
C. D. &c. [the other plaintiffs, naming them], in
the sum of ———, for goods sold and deli-
vered by this deponent, and the said ———,
[naming the other plaintiffs] to the said E. F.

*Affidavit for money had and received.—Mo-
ney due on an account stated.— Money lent.
—Money laid out and expended. Where
four defendants are put in the same writ.*

——— That the defendant C. D. is justly
and truly indebted to this deponent in the sum
of ———, for so much money had and received
by the said C. D. for the use of this deponent.
And

And this deponent also maketh oath, that the defendant *E. F.* is indebted to this deponent in the sum of ———, for so much money due to this deponent upon the ballance of an account stated by and between the said *E. F.* and this deponent. And this deponent further maketh oath, that the defendant *G. H.* is indebted to him this deponent in the sum of ———, for so much money by this deponent lent to the said *G. H.* And this deponent further maketh oath, and saith, that the defendant *J. K.* is indebted to this deponent in the sum of ———, for so much money by this deponent paid, laid out, and expended, for the said *J. K.* at his request.

If for fees, &c. by an attorney.

——— For fees, work and labour, money laid out, journeys and attendance, of this deponent, in and about prosecuting and defending divers suits and actions, and for drawing and ingrossing divers deeds and writings, and money laid out about the same, for the said *C. D.*

The like by the executor or administrator, &c. of an attorney.

Affidavit of a debt, as appears by testator's books, is not sufficient.

——— indebted unto this deponent as executor (or executrix) of the last will and testament (or as administrator or administratrix) of all and singular the goods and chattels which were of *E. F.* gent. deceased, for fees, work, labour, and journies, of the said *E. F.* in his life-time, about the affairs of the said *C. D.* and for money by him the said *E. F.* in his life-time,

Str. 1219.

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about the affairs of the said C. D. paid, laid
out and expended.

For journies, horse-hire, and expences.

—— For divers journies taken by this deponent (or his servant, &c.) for the said C. D. at his request, and for horse-hire and necessary expences, in and about the said journies.

On a bond.

Affidavit of a
debt, as it ap-
pears by the
bond, is not
sufficient. *Sir.*

1157.

—— For principal and interest due on a bond entered into by the said C. D. E. F. and G. H. jointly and severally, unto this deponent, in the penal sum of ——

For meat, drink, washing, and lodging.

—— For meat, drink, washing, and lodging, by this deponent for the said C. D. found and provided.

For cure of a wound, &c. by a surgeon.

—— For the work and labour in and about curing a wound, &c. (as the case is) of the said C. D. and for divers things necessary for the said cure, by this deponent about the same found and provided.

On a note by the drawee against the drawer.

—— That *A. B.* of ——, is indebted to this deponent in —— *l.* upon a promissory note under the hand of the said *A. B.* payable to this deponent, or order, on demand, [or on a certain day now past, or mention the day, as the case requires.] C. D.

For medicines, &c. of an apothecary.

—— For divers medicines, and other things belonging to the business of an apothecary, by this deponent found and provided, administered and given, to the said *C. D.* (or to his wife, child, or servant, as the case is) at his request.

Note; You may say, that the defendant is indebted to you in the sum of ——, for goods sold and delivered, money laid out, journies and attendances, &c. as occasion requires.

For grazing cattle.

—— For grazing, feeding, or depasturing the cattle (or mention the particulars) of the said *C. D.* from —— to —— last.

By the indorsee against the drawer.

—— That *A. B.* of ——, is indebted to this deponent *E. F.* in ——, as indorsee of one *C. D.* of a promissory note, drawn by the said

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A. B. and payable to the said *C. D.* or order,
&c. (as above.) *E. F.*

On a bill of exchange by the drawer.

— That *C. D.* is indebted to this deponent
A. B. in — *l.* upon an inland (or foreign) bill
 of exchange, drawn by one *F. F.* upon the said
C. D. payable to the said *A. B.* or order, on a
 day now past, and accepted by the said *C. D.*
 according to the custom of merchants.

*A. B.**For rent.*

— Indebted unto this deponent for a year's
 rent of a house, messuage, *&c.* in —, due to
 the said deponent at — last past.

For the hire of milch cows.

— For the milk, use, and produce, of —
 milch cows by the said *C. D.* had and received,
 (or you may say, for the hire of milch cows.)

For the use and occupation.

— For the use and occupation of a
 messuage, *&c.* in — from — to —
 last.

By

By the second indorsee against the drawer.

— That *A. B.* of —, is indebted to this deponent *G. H.* in — *l.* as indorsee of one *C. D.* of a promissory note, drawn by the said *A. B.* and payable to the said *C. D.* or order, &c. (as before, p. 35.) *G. H.*

The like by an indorsee.

— That *L. M.* of —, is indebted to this deponent *J. T.* in — *l.* as indorsee of one *G. U.* of a bill of exchange drawn by one *E. F.* upon the said *L. M.* payable to the said *G. U.* at a day now past, and accepted by the said *L. M.* according to the custom of merchants.

By an indorsee against an indorser.

— That *C. D.* of —, is indebted to this deponent *E. F.* in — *l.* as indorsee of a promissory note, drawn by one *A. B.* and payable to the said *C. D.* or order, (as above.)

Affidavit of an assault, in order to procure a judge's order for holding the defendant to bail.

A. B. of, &c. maketh oath, that on *Friday* the — day of — last past, he, this deponent, going, &c. [Here set forth the particulars of the assault,] and that this deponent made no opposition or resistance against the defendant.

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For a debt due upon an exchange.

—— indebted to this deponent *A. B.* in the sum of —— *l.* which the said *C. D.* promised to pay to this deponent, upon an exchange lately made between the said *C. D.* and this deponent, of a certain mare of the said deponent, for a certain horse of the said *C. D.*

Affidavit in trover or detinue.

—— maketh oath, that the said *C. D.* now has or lately had in his possession (as he this deponent is informed, and verily believes to be true) divers goods and chattels, to wit, [here you may mention the things particularly, as a gold watch, &c.] of this deponent's, of the value of —— *l.* and upwards; which said goods and chattels the said *C. D.* *unjustly detains, or has unlawfully converted them to his own use.*

A Quaker's affirmation in the King's Bench.

A. B. of, &c. grocer, being one of the people called Quakers, solemnly affirms, that *C. D.* is indebted to this affirmant in the sum of ——, for goods sold and delivered, [as the case is,]

A. B.

Affirmed at the King's Bench
office, the —— day of ——
1759, before

Process.

Process.

Of suing out process (a).

(a) Where the process is

against two on a joint cause of action, and one only appearing, the other must be outlawed before there can be any further proceedings. *M. 8 G. 2. Edwards v. Carteret, al' Str. 473.*

BILL of *Middlesex*.] (b) Make a *præcipe* (i. e. (b) This is the leading process, when the action is first commenced in this court. (c) You draw a line under the defendant's Christian and surnames, if the action requires bail, otherwise not.

J. U.

Ret', &c.

June 1759.

the defendant's Christian and surnames, if the action requires bail, otherwise not.

Fill up a blank bill of *Middlesex* (duty 2 s.) You may put four defendants in one writ, carry *præcipe*, bill and affidavit (d) of debt, if the action beailable, to the bill of *Middlesex* office, now in *Clifford's-Inn*. Pay for signing bill in term, 6d. in vacation, 10d. Swearing affidavits 1 s. Indorse the attorney's name, and the day and year the bill is sued out on, and ifailable the sum sworn to, for which sum the sheriff is to take bail.—A bill of *Middlesex* is not sealed.

(d) Note; the Stat. requires a full oath previous to the issuing of the process, that defendants may not be harrassed; and therefore, if the act is

not complied with, the court will discharge the defendant upon common bail. *Vid. Str. 1157.* Affidavit of any cause of action before process sued out may be sworn before a proper commissioner, although attorney for plaintiff. *Rule E. 45 G. 2.*

In case the bill is not executed before the return, you sue out an *alias* and *pluries*, (indorsing each as above directed); pay for signing each 2 d. neither to be sealed.

1. A bill of *Middlesex* is well described as the precept of the king. *Str.* 1069.
2. Serving a bill of *Middlesex* on *A.* while he was attending the sittings in a cause wherein he was defendant, is a contempt, and the court would have committed the attorney, if he had not consented to waive the proceedings and pay costs. *T. 11 G. 2. Cole v. Hawkins. Str.* 1095.

Middlesex, IT is commanded to the sheriff, that to wit. **I** he take *A. B.* and *Richard Roe*, if they may be found in his bailiwick, and keep them safely, so that he may have their bodies before the lord the king at *Westminster*, on *Monday*, &c. to answer (a) *C. D.* of a plea of trespass*; and that he have then there this precept.

(a) If the action be in a *qui tam*, then,

you say, to answer to *A. B.* who sues as well for our sovereign lord the king as for himself, in this cause, in a plea of trespass, &c. But in *T. 18 G. 2.* it was held, that plaintiff may declare *qui tam*, though the process was not so, it not being usual to insert in the bill of *Middlesex* in what right the party sues, as in case of executors and administrators, the case of an assignee of a bail bond, and the like, where the process is only *ad respondendum* to *A. B.* *Sty. 1232.*

By bill.

Lee and Antonie.

IF the action be bailable, then you insert a proper *acetiam* in the place where the asterisk is.

The

The form of an acetiam in debt (a).

(a) The acetiam billæ was introduced by stat. 13 Car. 2. stat. 2.

* And also to a bill of the said C. against the said A. for — pounds of debt, according to the custom of the court of the lord the king, before the king himself to be exhibited, and that he, &c.

Assumpsit.

* And also to a bill of the said — against the said — for —, upon promise, according, &c.

Trespass.

* And also, &c. for taking and carrying away the goods and chattels of the said —, to his damage of —, according to, &c.

Trover.

* For converting and disposing of the goods and chattels of the said —, to the value of —, according, &c. Cro. Jac. 667.

Detinue.

* For detaining the goods and chattels of the said —, to the value of —, according to, &c.

Covenant.

Covenant.

* For breach of covenant to the damage of the said —, of —, according, &c.

If there be several defendants say,

* To answer C. D. of a plea of trespass, and also the several bills of the said C. D. against the said A. B. for —, upon promise, and against the said E. F. for — l. of debt, according, &c.

But if two are severally bound in a bond of 40 l. then the *acetiam* must be *pro 40 l. de delicto separatim*.

Alias Bill of Middlesex.

Middlesex, **I**T is commanded to the sheriff, as to wit, **I** it was before commanded to him, that he take, &c.

Pluries bill.

Middlesex, **I**T is commanded to the sheriff, as to wit, **I** it has been oftentimes commanded to him, that, &c.

Præcipe.

MIDDLESEX alias bill or *pluries* bill for &c. as before.

If the defendant lives in any liberty where the sheriff of *Middlesex* may not enter, get the sheriff to direct his warrant to the bailiff of that liberty; and if the bailiff of the liberty does not execute it, you must get the sheriff to return a *mandavi ballivo*,

ballivo, and then you make out a *non omittas* bill of *Middlesex*; whereupon the sheriff may enter the liberty, and arrest the defendant.

The form of a non omittas bill of Middlesex.

Middlesex, **I**T is commanded to the sheriff, that to wit, **I** he do not forbear by reason of any liberty in his county, but that he take, &c. as before.

Præcipe.

MIDDLESEX *non omittas* bill for ———, against ———, as before. Pay for signing *non omittas* in term 6d. in vacation 10d. not to be sealed.

In order to save the statute of limitations, you may sue out a bill of *Middlesex* any time within six years after the debt contracted. Get it returned *non est inventus* by the sheriff, then enter the bill on a roll, and file it with the signer of the *latitats*, pay 4d. Docket, and carry in the roll as in other cases.

The entry of a bill of *Middlesex* on the roll to save the statute of limitations.

As yet of the term of St. Hilary.

Middlesex, **T**HE sheriff is commanded, that to wit, **I** he take *A. B.* and *John Doe*, if they may be found in his bailiwick, and keep them safely, so that he may have their bodies before the lord the king at *Westminster*, on *Monday* next after, &c. (the return) to answer *C. D.* in

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in a plea of trespass, and also to a bill of the said C. against the said A. for 20*l.* upon promise, according to the custom of the court of the lord the king, before the king himself to be exhibited (a), and that he have then there this precept.

(a) Note; notwithstanding the bill is

made out with an *acetiam*, yet there is no affidavit made of the debt, and consequently no indorsement for bail.

By bill.

Lee and Anthonie.

AT which day, before our lord the king at Westminster, came the said C. in his proper person, and offered himself against the said A. in the plea aforesaid; and the sheriff of Middlesex, to wit, G. F. esq; and J. K. esq; returned, that the aforesaid A. was not found in his bailiwick.

Roll.

The docket paper.

ENTRY made by B. S. one &c.

Middlesex, to wit, Bill of Middlesex for C. D. against A. B. and John Doe.

Ret' &c.

} Roll.

N O T E S.

1. A *latitat* prevents the statute of Limitations, without a bill of Middlesex.

2. *Assumpsit* for 1500*l.* for portion promised with defendant's daughter. Defendant pleaded, *non assumpsit infra sex annos*. The plaintiff replied,

plied, that such a term he sued out an *alias lat'* against the defendant for the same cause, and continues it down. Defendant demurs. *Cur'*. You cannot begin with an *alias*, but you must set out a *lat'*. *Hil. 27 & 28 Car. 2. Jeven v. Cotton, B. R. M. S. Rep.*

3. The defendant pleaded *non assumpsit infra sex annos*. Plaintiff replied a *lat'*; and the court, on demurrer, held it well enough without shewing a bill of *Middlesex*. *Hil. 9 G. 1. Hollister v. Loulson. Str. 550. — Ibid. 734. M. 13 G. 1. in Crockett v. Jones, S. P. determined per Cur'.* — *Note*; *Raymond* at first doubted whether the plaintiff ought not to have shewn, whether a bill of *Middlesex* issued before the *lat'*, because the bill is the foundation of the *lat'*; but afterwards he agreed with the rest of the court, that it was not necessary.

4. Action upon the case upon a bill of exchange. Defendant pleaded, that the bill was first exhibited 23 Oct. 12 G. *quodque non assumpsit infra sex annos ante exhibitionem billæ*. Plaintiff replied, that the action was first commenced 28 Nov. 11 G. and that defendant promised within six years before that. Defendant demurred. And insisted for defendant, that it was not enough to say the action was first commenced such a day, without shewing the process, and continuing it down to the time of the declaration, and so is *Salk. 420. Cur'* afterwards gave leave to amend the replication, by setting out the *lat'*, and adding the continuances on payment of costs. *M. 13 G. 1. Crockett v. Jones. Strange 734.*

The present Practice of the

Cities and towns having a sheriff or sheriffs.

CITIES of Bristol, Coventry, Chester, York, Gloucester, Lincoln, London, Norwich, and town of Nottingham, have each two sheriffs.

Cities of Canterbury, Exeter, Litchfield, and Worcester, have each one sheriff.

Towns of Kingston upon Hull, Southampton, Pool, and Newcastle upon Tyne, have each one sheriff.

Latitat.

What.] A *latitat* is in nature of a *testatur* bill of *Middlesex*, and is to be sued out when the defendant lives in any other county than *Middlesex*.

Suing it out.] Make a *præcipe*, fill up a blank *lat'*, duty 2 s. Carry the *præcipe*, *lat'*, and affidavit, if bailable, to the King's Bench office, and Mr. Heberden, the signer of the writs there, will sign the *lat'*; pay him 2 s. 6 d. Swearing affidavit 1 s. Sealing *lat'* 7 d.

Remember to indorse your *lat'*, as is directed under *tit. bill of Middlesex*, p. 19.

Alias, &c.] If the *lat'* be not executed before the return, you sue out an *alias*, and then *pluries*.—Make out a *præcipe* for each. Indorse each as before directed. Pay nothing for signing either, sealing each 7 d.—*Note*; after the first *pluries* you sue out a second, &c. for four terms from the suing out of the *lat'*, and after that a new *lat'*.

If your first process be a bill of *Middlesex*, and defendant, before he is arrested, remove into another county, you may get a copy of the affidavit of the debt from the bill of *Middlesex* office, (stamp 1s. 6d. pay for copy according to the length); and upon filing that copy with Mr. *Heberden*, he will sign your *lat'*. The like may be done if a *lat'* issued first, and then defendant removes into *Middlesex*.

N O T E S.

1. A *lat'* will prevent the statute of limitations. See before, p. 44, 45.

2. *Teste* of a *lat'* may be made any day in term, that is a day in court; but the usual way in term time is to make the *teste* thereof the first day of the term. But if it be sued out in the vacation, then make the *teste* thereof the last day of the preceding term. 2 *Salk.* 700.

3. There is no certain number of days necessary to be between the *teste* and return of a special *lat'*, even one day is sufficient, if it can be served. *M. 5 G. 2. Loving v. Avery. Str.* 917.

4. *Latitats* are now executed in *Wales*, counties palatine, and the cinque ports.

5. The court of King's Bench will expect a return of a *lat'* to *Durham*, and will grant an attachment against the proper officer of the bishop, if he refuses to issue the usual mandate for the execution of the process, upon pretence that process of *B. R.* will not run in the county palatine. *E. 11 G. 2. Chapman v. Maddison. Str.* 1089. In this case *Cur'* declared, that whatever might be the case, when the question came properly before them upon a claim of co-nusance,

nufance, or plea to the jurisdiction, yet they would never endure, that the officer should refuse to receive their procefs. They cited *Lee v. Ransome. M. 9 G. 2.* Where to a *lat'* into *Lancaster*, it was returned, that the writ lay not, and *Cur'* quashed the return, as not being a proper way of bringing the point in question. They said the true meaning of the expression *breve domini regis non currit*, is, that the court cannot write directly to the sheriff, as they do in other cases. *Ibid.*

The form of a latitat.

See several other *acetiams*, p. 41. But only in a *lat'* say, instead of and also a bill of the said *C.* against, &c. according to the custom of the court of the lord the king, before the king himself to be exhibited; you

must say, according to the custom of our court before us to be exhibited. If the defendant is not to be held to bail, you leave out the *acetiam*, trespass being sufficient.

GEORGE the second, &c. To the sheriffs of *London*, greeting. Whereas we lately commanded our sheriff of *Middlesex*, that he should take *A. B.* if he might be found in his bailiwick, and safely keep him, so that he might have his body before us at *Westminster*, at a certain day now past, to answer *C. D.* in a plea of trespass, and also to a bill of the said *C.* against the said *A.* for pounds upon promise, according to the custom of our court before us to be exhibited; and our said sheriff of *Middlesex* at that day returned to us, that the said *A.* was not found in his bailiwick; whereupon on the behalf of the aforesaid *C.* it is sufficiently testified in our court before us, that the said *A.* doth lurk and secrete himself in your county: therefore we command you, that you take him if he shall be found in your bailiwick, and safely keep him, so that you may have his

body

body before us at *Westminster*, on next
after to answer the said C. in the plea
[and bill] (a) aforesaid, and have you there then (a) [*If bail-*
this writ. Witness, &c. *able.*]

Bail for A. by oath,

R. M.

Lee and Antonie.

1 Jan. 1760.

The præcipe or note for the office.

London. Lat' for C. D. against A. B. (b)

R. M.

Ret' Monday, 8 St. Hil.

1 Jan. 1760.

(b) Draw a
line under de-
fendant's
name, if the
writ be bail-
able, other-
wise not.

The form of an alias capias.

GEORGE, &c. To the sheriffs of *London*,
greeting. We command you, as we have
before commanded you, that you take A. B. if
he may be found in your bailiwick, and safely
keep him, so that you may have his body before
us at *Westminster*, on next after
to answer C. D. of a plea of trespass, and also,
&c. [*here insert the proper acetiam, if the action*
is bailable.] And have there then this writ.
Witness, &c.

Lee and Antonie.

If bailable, indorse as before.

Pluries.

THE *pluries capias* is the same, only instead
of the words "as we have before com-
manded you," you must say, "as we have
many times commanded you."

VOL. I. PART I.

E

Non

Non omittas.

Of suing it
out.]

IF the defendant lives in any liberty into which the sheriff cannot enter to execute your *lat'*, *alias*, or *pluries*, get him to direct the warrant to the bailiff of the liberty; and upon the return of a *mandavi ballivo*, you may make out a *non omittas*. But it is usual to sue out a *non omittas* in the first instance, directed to the sheriff, and then any other bailiff may execute the writ.

If a *lat'* has been sued out before, you pay nothing for signing a *non omittas*, only for sealing 7 *d.* if no *lat'* has been sued out, then you pay 2 *s.* 6 *d.* signing, and 1 *s.* 2 *d.* sealing.

The form of a non omittas.

GEORGE the second, &c. To the sheriff. We command you, that you do not forbear by reason of any liberty of your county, but that you take *A. B.* &c. in common form.

NOTES; on filling up writs.

A *lat'* may be
tsted before
the plaintiff's
cause of
action, but
the party must
not be ar-
rested upon it

1. You need not insert in a writ, on what account, or in what right, the party sues, as in the case of executors or administrators, the case of an assignee of a bail bond, and the like, where the process is only to answer to *A. B.* *Per Cur'* in the case of the weavers company *qui tam v.* before the money is due; but if an *original* bears tste before the money is due, it is abateable; but the *lat'* is only to bring defendant in custody, that plaintiff may declare against him by *bill*, and then proceedings on the *lat'* cease. 1 *Ventr.* 28.

Forrest.

Forrest. T. 18 G. 2. Str. 1232. This was in case of a bill of *Middlesex*, where the bill was to answer to the weavers company, and the declaration was in the name of the company *qui tam* for themselves, &c. and held to be right. *Ibid.*

2. By *Rule Mich. 15 Car. 2.* no writ, with the clause of *acetiam*, is to be sued forth against an heir, executor, or administrator, so as to oblige him to put in special bail.

Attachment of privilege.] Vide proceedings by attornies, p. —.

Of executing process.

Where not bailable.] Where the action is not bailable, defendant is to be *personally* served with a copy of the process (a), within the city or county into which the writ is directed, with notice subscribed of the intent of the service. (a) And not with the chamberlain's mandate; where the writ issues into a county palatine.

Notice (b).

(b) No fee for this Notice.

A. B. you are served with this process, to the intent that you may by your attorney appear [“for yourself and *M.* your wife,”] if the action be against baron and feme] in his majesty's court of King's Bench at the return thereof, being the day of in order to your defence in this action.

If the writ be against several defendants, you must name them all in the notice and copies, (except it be against husband and wife), for each

The present Practice of the

defendant is to be served with a true copy of the whole writ.

You charge for a copy of the writ and service 5s. Stat. 12 G. 1. c. 29. 5 G. 2. c. 27. made perpetual by 21 G. 2. c. 3.

Of executing writ where bailable.] If the action be bailable, get a warrant on the writ; in *Middlesex* pay 4d. in *Essex*, *Surry*, and *Kent*, 6d. In *Westminster* a warrant from the high bailiff is 2s. 4d. In other counties usually 2s. 6d. Deliver the warrant to the officer, who will arrest the defendant. *Note*; in particular franchises the proper officer there shall execute the process. Stat. 5 G. 2. c. 27. s. 3.

N O T E S.

1. On the act 12 G. 1. c. 29. which requires the process to be served, it is not necessary to shew the party the original writ, as you do on service of rules. The act only requires him to be served with a copy, which is the same as if it had said *deliver a copy*. *Per Cur'*. M. 4 G. 2. *Worley v. Glover*, in B. R. Str. 877.

2. *English* notice on process to appear, only said to appear, &c. being *the 14th of June*, without saying *this instant*, or expressing *the year of our Lord*, or *the king*; and held to be right; for *per Cur'* it must be understood to be the next 14th of June. T. 18 G. 2. Str. 1233.

Guardian (*a*).

(*a*) See a petition to assign an infant a guardian, p.

How to admit a guardian for an infant before a judge to prosecute and defend.

GET a piece of parchment like a bail piece, and write thereon as follows ;

Midd. to wit, *A. B.* Who is within the age of twenty-one, is admitted by the court of our sovereign lord the king, before the king himself, by *J. S.* gent. his guardian, to prosecute and defend all and all manner of actions and suits, depending in the same court, at the suit of *C. D.*

After the admission is signed by the judge, carry it to the clerk of the rules, and file and enter it with him ; for it is no record till that be done ; and the clerk of the rules will draw up a rule upon this admission.

In error ; adjudged, that if a guardian be admitted to defend for an infant, and yet the entry happens to be *per attorn'*, the record shall be amended, and made *per guard'* ; otherwise where no such admittance. *T. 27 Car. 2. M. S. Rep. in B. R.*

N O T E S.

1. An infant brought an action of assault, and declared *per guardianum*. And to prove that his witness was the promoter of the cause, and at the expence of it, the *chief justice* allowed the defendant to give the guardian's declaration to that purpose in evidence, he being a person liable to costs. *Hil. 9 G. 1. James v. Hatfield, at Guildhall, coram King C. J. Str. 548.*

If an infant refuses to name a guardian to appear by, plaintiff may do it for him. *Vide* P. 55, note 4.

2. An infant may sue by his *procchein amy*, or guardian, but he must always *defend* by guardian. And the reason why an infant cannot authorize an attorney to appear for him is, because he is not supposed to be capable of choosing a proper person, and therefore he must have a guardian appointed, against whom he may have an easy remedy in case of misbehaviour.

3. A general admission of a *procchein amy* is sufficient, without a special assignment by the court. *Str. 304.*

Bail.

Common bail (a).

(a) To be written on a piece of parchment, stamped with a treble 6 d. stamp.

FILE it with the clerk of the common bails. In term pay 1s. 2d. but if not filed within six days after the end of the term, your writ is ret'. You pay 4d. more for a post term; but

but you do not pay for another post term, till the vacation of the subsequent term.

Common bail must be filed by the *defendant* in eight days *exclusive* after the ret' of process; or afterwards by *plaintiff* according to the stat. affidavit of serving process being made, which may be sworn before a *judge, commissioner*, or clerk of the com' bails, or his deputy, and filed *gratis* with the clerk of the rules. When common bail is filed by the plaintiff, you add on the bail piece, after the attorney's name, these words, *filed according to the stat. (a)*. This common bail piece may be filed by the plaintiff at any time after eight days after the ret' of the writ is expired, before judgment signed, if defendant hath not done it before, but it must be made of the term the writ is ret', though filed of a subsequent term, which may be done by paying post terminums.

See stat. 5 G.
2. c. 27.

(a) Rule M.
19 G. 2.

N O T E S.

1. Voluntary appearance invalid, unless a *lat'* or bill of *Middlesex*, (where defendant abides in *Middlesex*) be sued out in fourteen days after such appearance. *T. 4 W. & M.*

2. If baron and feme are sued, the baron must appear for himself and his wife. And the notice on the copy of the process must be thus; "Mr. *A. B.* you are served, &c. to the intent "that you may, by your attorney, appear for "yourself and *M.* your wife, &c."

3. Where an attorney undertakes to appear, *Cur'* will oblige him to do it in all events. *E.* But not unless he has undertaken in writing.
12 G. 1. *Str.* 693.

4. By 12 G. 1. c. 29. If defendant does not file common bail in time, plaintiff may do it

The present Practice of the

for him. In this case defendant was an infant, and had appointed no guardian by whom to appear: *Cur'* made a rule that plaintiff should name a guardian for him, if he refused to do it himself. *T. 10 G. 2. Storne v. Atwoll. Str. 1076.*

5. Affidavit to hold to special bail being defective, common bail was ordered. On 19 April plaintiff made a full affidavit, and took out a new writ, and held defendant to bail, and next day moved to discontinue on payment of costs. Plaintiff should have had the costs taxed and paid before he took out a new writ. Defendant discharged upon common bail, and plaintiff to pay him his costs of this application. *T. 17 G. 2. Belifante v. Levy. Str. 1209.*

6. Defendant being arrested for 25 *l.* lay in gaol till he was superseded. Plaintiff afterwards got a note of him for 20 *l.* and held him to bail for 20 *l.* *Cur'* discharged him upon common bail; for it is but a farther security, and does not extinguish the former case of action, which may be declared upon. *Hil. M. 18 G. 2. Taylor v. Wasteneys. Str. 1218.*

Vide S. bail.

7. A woman arrested by her maiden name, and being a feme covert, prays to be discharged on common bail, which would not be granted; for *per Holt Ch. J.* if it appears to the eye of the world, that she is married, the court will grant it, but in this case the defendant's husband absconds, &c. 13 May 1689. *B. R. M. S. Rep.*

8. Upon debate it was held, that the rule for payment of 5 *l.* for not filing common bail, according to the 9 & 10 *W. 3. c. 25. s. 33.* should be made absolute on the first motion, the words of the statute being, that the court shall immediately

diately award judgment; whereon the plaintiff may take out execution. 13 G. 1. *White v. Holland & al.* Str. 737.

The form of a common bail piece.

Of the term of St. Mich. in the thirty-first year of king George the second. The term the writ is ret' of.

Middlesex, *A. B.* having been served with process (a), is delivered on bail, to wit,

To *John Doe*, of *London*, gent.

and

Richard Roe, of the same place, gent.

R. S.

At the suit of *C. D.*

attorney (b).

(a) As the taking the body is now dispensed with by the stat. where the debt is under 10 l. I have taken the li-

berty to omit the words "upon an arrest," in the common bail piece.

(b) If common bail be filed by plaintiff, then say, "filed according to the statute." *R. S. Attorney.*

The form of the affidavit of service of process, in order to file common bail for defendant, according to the statute.

In the King's Bench.

Between { *A. B.* plaintiff,
and
C. D. defendant:

— of, &c. maketh oath, that he this deponent did, on the — day of —, at — in the county of — [or city of —] personally serve the defendant in this service. See

That it is not necessary to shew the writ at the time of service. See post. p. 52.

note 1. See also the *Common Pleas Pract.* p. —

cause

cause with a true copy of a *lat'* (*alias, capias, pluries capias*, as the case is), which appears to this deponent to be regularly issued out of this honourable court against the said defendant (and others), at the suit of the said plaintiff, returnable in this court on — [naming the return] under which said copy was written an *English* notice to the said defendant of the intent of such service, pursuant to the statute in that case made and provided.

Sworn, &c.

In the Common Pleas the like form will do only you say *capias*, &c. instead of *lat'*.

Special bail (a).

(a) Two people put in bail

in feigned names, and because there were no such persons, they could not be prosecuted for personating bail on the statute 21 Jac. 1. c. 26. So the court ordered them and their attorney to be set in the pillory, which was done accordingly. T. 6 G. 1. *Anon. in C. B. Str.* 384.

Special bail on cepi corpus, when to be put in.]

Defendant being arrested, may give a bail bond to the sheriff, and if arrested in *London* or *Middlesex*, he must put in special bail in four days

(b) The rule of Mich. 8 *Annæ* does not

exclusive (b) after the return of the writ. If in mention whether the four and six days are to be *inclusive* or *exclusive* of the day of the return of the process; but the practice of this court is, to reckon the days *exclusive*. And here it may be proper to observe, that in all cases where it is not ascertained by the rules of this court, which require a matter to be done or not to be done within so many days, how the days are to be reckoned, whether *inclusively* or *exclusively*; yet the practice is to reckon the days *exclusive*, tho' in the Common Pleas they are reckoned *inclusive*; and so the eight days, which the defendant has by the late act to appear after the return of the process, are in this court reckoned *exclusive*, in the Common Pleas *inclusive*, of the day of return of the process; which difference in reckoning is, in the short terms, sometimes a means of gaining the term, and gives the suitor in one court an advantage which the suitor in the other has not.

any other county in six days *exclusive*. Rule M. 8 Ann. or the bail bond may be assigned.

But if either the fourth or sixth day for putting in bail fall on a *Sunday* (a), it may be put in on the *Monday*. See Str. 782, 914.

(a) Note ;
Sunday is a
day in rules,
unless the first
or last. Str.

How to put in special bail in London.] Ingross the bail piece on a double 1 s. stamped piece of parchment, carry it to a judge's chambers, and, having the bail there, the judge's clerk will take the bail. Pay him 4 s. in term, in vacation 5 s. Give the plaintiff's attorney *immediate* notice in writing of your having put in bail, (*Vide Rule Mich. 16 Car. 2.*) that he may inquire into the sufficiency of the bail.

Of putting in bail in the country, and transmitting it.] Carry the bail piece to a commissioner of the court, and he will take the recognizance. Affidavit of taking it must be made either before a judge of B. R. to whom the bail piece shall be transmitted, or before a commissioner. If the affidavit be sworn before a commissioner, it must be drawn in form, and annexed to the bail piece to be filed together. And if the bail be taken by a commissioner within forty miles of *London* and *Westminster*, it must be transmitted to one of the judges of B. R. within eight days after the taking thereof; if taken above forty miles in 15 days, unless all the judges of B. R. shall be on their circuits, and then as soon as any one of them shall return to his chambers. T. 8 W. 3.

Please to observe, that by the rule of M. 8 Ann. In all counties, except *London* and *Middlesex*, the defendant hath six days after the return of the process to put in bail; and by the rule

T.

T. 8 W. 3. eight to transmit it, if within forty miles, being in all fourteen days; if above forty miles, then six days by *M. 8 Ann.* to put in bail, and by *T. 8 W. 3.* fifteen to transmit it, in all twenty-one; which times are to be observed by the defendant, or the bail bond may be assigned.

Excepting against bail.] Exception to bail put in *before a judge* to be made in twenty days *after* notice thereof given to plaintiff or his attorney. *M. 16 Car. 2.* Afterwards void. *M. 8 Ann.* If put in before a *commissioner*, exception to be within twenty days after the bail is transmitted, and notice to *plaintiff*, or his attorney, of the taking thereof. *8 W. 3.* — Exception against bail is made in the bail book at the judge's chambers; if by original, it is in the filazer's book. Notice in writing of having excepted against bail must be given without delay to defendant's attorney. *E. 2 G. 2. E. 5 G. 2.* — If the plaintiff shall not except to the bail within twenty days next after notice of putting it in, (given to himself or his attorney) then, upon affidavit of such notice indorsed on the back of the bail piece (for which oath no fee shall be taken), the bail shall be filed by the defendant's attorney within four days next after the end of the said twenty days.

In a country
cause it is of-
ten impossible
to justify or

Of justifying bail.] If notice of exception be given to defendant's attorney in term, the bail must justify in four days (exclusive) after such add other bail within the four days, and therefore it is usual to send up an affidavit of justification along with the bail piece, (*Vide p. 61. at the bottom*); but if that be not done, you must move for time to justify, &c. on proper affidavits,

notice,

notice, or must find other bail who will justify within the said four days. But if exception, and notice thereof be given in vacation, the bail put in, or additional bail, must justify upon the first day of the subsequent term. *E 5 G. 2.* — Two days notice of justification must be given exclusive of the day it is given, and if *Sunday* intervenes, three days notice. If the defendant does not attend the court, the bail must swear they are worth *double* the sum indorsed on the writ. — Bail put in town cannot be justified before a judge at his chambers, but only in court, upon notice given thereof, and affidavit of such notice. But by consent of plaintiff's attorney it may be at a judge's chambers. — But bail taken before a commissioner may be justified, without their personal attendance in court, by affidavit, setting forth that they are housekeepers, and are respectively worth so much (mentioning the sum they are bail for), after all their debts are paid.

How to justify bail in court.] Get the judge's clerk to attend the court with the bail piece; pay him 2 s. 6 d. Having the bail ready, move by counsel to justify. — If the bail be taken before a commissioner, the cognizors, if they cannot personally attend, may justify themselves in open court, either by affidavit made before a judge of *B. R.* or the commissioner that took the bail. *Rule T. 8 W. 3.*

How to justify bail before a judge.] As the bail piece remains at the judge's chambers till the bail be perfected, bring the bail there to justify. Pay in term 1 s. in vacation 2 s. each person.

Note;

Note; when bail is taken in the country, the usual way is for defendant's attorney to send his agent an affidavit of justification (which may be annexed to the bail piece) at the same time he sends the bail piece; a copy of which being sent to the plaintiff's agent, with notice of bail being put in, exception is seldom taken; but if it be, the affidavit of justification may (on notice given in writing of justification) be produced either in court, or (by consent) before a judge, for justification.

Vide [Exception against bail] p. 60.

Filing bail.] When bail is accepted, the bail piece must be filed within twenty days after by the attorney who put it in. *T. 13 Car. 2.* You file the bail piece with Mr. *Heberden*, the signer of the *lats'*. Pay him *4d.* *Note*; Bail taken on or before the continuance day is a bail, and to be filed of the preceding term; if after, of the subsequent term; but where new bail is added to other bail taken before the continuance day, the new bail shall be taken and filed as of that term in which the first bail was put in.

NOTES concerning special bail.

1. No special bail in debt on a judgment, unless the debt or damages, *without costs*, amounts to 10*l.* or upwards (*a*); nor in covenant, unless by rule of court, or the covenant be for payment of money (*b*); nor in actions against bail on the
- (a) Where the original debt does not require bail, the addition of costs will not warrant holding to bail in an action of debt on the judgment.—Common bail to be accepted. *E. 7 G. 2. Gamage v. Watkins. Str. 975. Ibid. 1077. Robinson, &c. v. Nicolls. T. 10 G. 2. S. P.*
- (b) In covenant, when *uncertain* what shall be recovered, there it is usual to accept of common bail; but when the covenant is for payment of money, it is the same as an action of debt, and special bail may be required. *M. S. Notes.*

bail bond; nor in battery, false imprisonment, privilege, (except for fees) or slander of title, unless special motion and order. *Mich.* 1654. *sect.* 9.—Nor in actions against *heirs*, executors, or administrators. *Rule M.* 15 *Car.* 2.—No bail upon penal statutes. *Yelv.* 53.

2. No attorney of this or any other court to be bail. *M.* 14 *G.* 2. Former *Rule M.* 1654. *f.* 1.—No sheriff, officer, bailiff, or other person concerned in the execution of process, to be bail in any action or suit depending in this court. *M.* 14 *G.* 2. *Str.* 890.

3. If an *original* be sued out in one county, and the declaration laid in another, though it be good against the *defendant*, yet the *bail* are discharged, and not liable to a *sci. fa.* otherwise if by *bill.* 3 *Lev.* 235, 245.

4. After a *nonpros* the defendant shall find bail to the second action, for the plaintiff suffers enough by paying costs in the first action, and therefore ought not to be in a worse condition than before. *T.* 7 *G.* 1. *Turton v. Hayes.* *Str.* 439. See 1 *R. Raym.* 679.

5. Where the defendant might have pleaded bankruptcy in the first action, he shall give bail in debt upon the judgment: As in debt upon a bond, *non est factum* pleaded, and verdict and judgment for the plaintiff. To a *sci. fa.* on this judgment, the defendant pleaded bankruptcy, and that the cause of action accrued before: and on the trial it appeared the bond was given before the bankruptcy, but the judgment was after; and the judge, who tried the cause, being of opinion against the defendant, there was a verdict for the plaintiff; and now in an action upon the judgment it was moved, that the defendant might be discharged upon com-
mon

mon bail, because the bond, which was the foundation of the demand, was before the bankruptcy, *sed non allocatur*. For *per Cur'*, we can look no farther backward than the judgment, and therefore there must be bail. *M. 8 G. 1. Combes v. Blackall. Str. 477.*

6. If the plaintiff obtains judgment on *sci. fa.* against the bail, pending error by the principal, and takes them in execution, the court will not set it aside. But if they had applied would have staid proceedings. *T. 8 G. 1. Fisher v. Emerton. Str. 526.*

If an action of debt had been brought upon the judgment, we should have granted an imparlance if it had been asked, but we never set aside the judgment when it is once signed; because we take it, you, by not applying in time, have submitted to meet the plaintiff. *Fieri non debet, factum valet. Ibid.*

7. Motion to take the bail piece off the file, and to file a new one, the bail being desirous to discharge themselves; which was done by plaintiff's consent. *Hil. 4 G. 2. Hammond v. Parsons. M. S. Rep.*

8. Case upon a note; plaintiff called one of defendant's bail to prove the hand. *Pratt Ch. J.* said, if he were a subscribing witness he would oblige him to give evidence, but otherwise he would leave him to his liberty. *M. 7 G. 1. Hawkins and Perkins. Str. 406.*

9. Adjudged that bail should be liable for no more than the action. *M. 12 G. 1. Tanner and Fogden in B. R. M. S. Rep. See Rule E. 5 G. 2.*

10. The plaintiff had delivered a declaration to the defendant in custody, and obtained an interlocutory judgment against him last term, and took out a writ of inquiry ret' this term. And

But bail cannot be a witness for defendant; but *Cur'* will discharge him on putting in another good bail.

And the day before the ret^d defendant moved to justify bail. Plaintiff insisted, that defendant came too late to put in bail after an interlocutory judgment, because the recognizance would appear to be of the same term with the final judgment, which could not be. But *Cur'* (after some debate) declared that matter might be cured, by making a special entry of the day of the recognizance, and of the day of the final judgment; and the bail was thereupon admitted to justify. *E. 13 G. 1. Parry v. Chapman, M. S. Rep.*

11. *Pratt* moved to justify bail, and one of the bail only appearing in court, he offered an affidavit of the sufficiency of other; but the court refused to read it, and said, he must appear in person; so the other bail only justified himself. *M. 13 G. 1. anon. M. S. Rep.*

12. Plaintiff made an affidavit, that defendant was indebted to him in 40*l.* *without shewing his cause of action*, and had a writ indorsed for bail for 40*l.* but before any warrant thereon, plaintiff made a proper affidavit. *Per Cur'*, though it may be regular in the course of things to file an affidavit before process sued out, yet it can never be intended as the ground of the process, but the arrest only; and here being a proper affidavit made before any warrant was taken out, defendant was ordered to put in special bail. *Hil. 4 G. 2. Hodbouse v. Hansell. M. S. Rep.*

13. Sheriffs officers or serjeants at mace are not to be bail. *Hil. 4 G. 2. Doldern v. Feast. tr. 890.*

14. Formerly, if the plaintiff declared for a greater sum than was expressed in the process, the bail were discharged. *T. 22 Car. 2.* But by a rule of *E. term 5 G. 2.* the bail shall not,

upon a recovery against the defendant, be answerable for any greater sum than is sworn to and indorsed on the process on which defendant was arrested (although one part of the condition of the recognizance is to pay the whole condemnation money, if the defendant does not); and if a greater sum be recovered, the bail shall not be discharged, but shall be liable for such sum as shall be sworn to and indorsed, or any lesser sum that shall be recovered against the defendant, together with costs of suit. — Where the recovery is for more than the bail is bound in, he is liable *pro tanto*. The *lat'* was with an *acetiam* for 80*l.* and the declaration was *ad damnum* 150*l.* and the verdict for 104*l.* and there being variety of opinions in the books, whether the bail should be liable *pro tanto*, or totally discharged, and the question having been many terms depending in this cause, it now came to be finally settled. And the authorities contradicting one another, the court took it up upon the reason of the thing; and *resolved*, that as on the one hand there was no colour to subject the bail to more than they were bound in, let the plaintiff's demand be ever so much more; so on the other hand there was no reason the plaintiff should suffer by his moderation in taking bail; but the recognizance should be considered as an agreement to pay 80*l.* or deliver up the defendant. And therefore they made a rule, that the goods of the bail taken in execution should be re-delivered, on the bail's paying the 80*l.* and the costs; or else the goods to be sold, and the surplus returned. *Hil. 5 G. 2. Martin v. Moor. Str. 922.*

Salk. 102.

6 *Mod.* 90,
267.

3 *Keb.* 16.

1 *Lill. Pract.*

Reg. 149.

2 *Show* 183.

15. *Where the debt does not require bail, costs will not warrant holding to bail in debt on the judgment.* The debt was three guineas, but the costs swelled it to 14*l.* 10*s.* for which plaintiff had judgment, and defendant brought a writ of error. Plaintiff brought debt upon the judgment, and held the defendant to bail; and now upon motion the proceedings were ordered to stay, pending the writ of error, and common bail to be accepted; for, as the *original* demand did not require bail, the *addition of costs* will not alter the case. *E. 7 G. 2. Gammage v. Wai kin. Str. 975.*

16. No special bail in debt on judgment, after defendant hath been superseded in the original action. *H. 8 G. 2. Clever v. Jordan. Str. 1039.* Nor upon penal statutes.

17. No special bail in an action brought on a judgment, after defendant has superseded himself for want of being charged in execution within two terms, in the *original* action it being the plaintiff's own laches, not to detain him when he might. *E. 9 G. 2. Hall v. Howes. Str. 1039.* And it was said to have been so ruled. *Hil. 8 G. 2. in B. R. Clever v. Jordan.* And to be the constant practice in *C. B. Ibid.*

18. Putting in bail above, where not required, does not bind the court from ordering common bail. *T. 10 G. 2. Robinson, &c. v. Nicolls. Str. 1077.*

19. In an action upon the *stat. 9 Ann. c. 14.* by the loser at gaming, special bail shall be given. *M. 11 G. 2. Turner v. Warren. Str. 1079.*

20. Special bail may be in trover, upon a proper affidavit, without an order of court or of a judge; for it is more an action of *property* than

than a *tort*. *T.* 16 G. 2. *Catlin v. Catlin.* *Str.* 1192. cites 2 *Mod.* 14. & *T.* 11 G. 2. *Pitts v. Meller*, in *B. R.*

21. The affidavit to hold to special bail being defective, common bail was ordered; and thereupon the plaintiff, on 19 *April*, made a full affidavit, and took out a new writ, and held the defendant to bail; and the next day, 20 *April*, moved to discontinue upon payment of costs. *Et per Cur'*, The plaintiff has been too quick, for he should have had the costs taxed and paid before he took out a new writ. Defendant discharged upon common bail, and plaintiff to pay him his costs of this application. *E.* 17 G. 2. *Belifante v. Levy.* *Str.* 1209. But where a defendant has been discharged on *perjured* bail, he may be held to bail on a second writ before the first is discontinued. *M.* 18 G. 2. *Olmus v. Delany.* *Str.* 1216.

22. *A.* being arrested for 25*l.* lay in jail till he was superseded. Plaintiff afterwards got a note of him for 20*l.* and brought a fresh action upon it, and held him to bail. *Cur'* discharged him upon common bail, for it is but a farther security, and does not extinguish the former cause of action, which may be declared upon still. *Mich.* 18 G. 2. *Taylor v. Wasteneys.* *Str.* 1218.

23. *A.* gave his note for 36*l.* and was afterwards discharged on the insolvent debtor's act. Afterwards *A.* promised plaintiff to pay the debt at two guineas *per* month, and paid twelve guineas accordingly; and being sued for the rest, *Cur'* discharged him on common bail, saying, it was no new contract, but the old debt. *T.* 18 G. 2. *Turner v. Schomberg.* *Str.* 1233.

24. Common

24. Common bail ordered for money recovered in a foreign court. Plaintiff recovered in the court of *Mendon* in *France* damages and costs, &c. He arrested the defendant *here*, and held him to bail, on an affidavit of so much being due to him *upon a judgment or decree*. *Cur'* held, this did not warrant holding to bail; for upon a *decree* here there can be no bail; and whatever might be the case of a money debt contracted and sued for abroad, yet this being a case of damages for a malicious prosecution, can never be construed to raise a debt here. Common bail ordered. *M. 19 G. 2. De Balf v. Mackensie. Str. 1243.*

25. Baron and feme were arrested for the feme's debt *dum sola*; *Cur'* discharged the wife, and said the baron must lie till he puts in bail for both. *1 Lev. 51, 216. & 1 Ven. 49.* Denied to be law. *T. 21 G. 2. Harrison v. Bearcliff. Str. 1272.*

26. If a writ be sued out against husband and wife, and the wife only be arrested, she shall not be compelled to put in bail for her husband, but may file common bail for herself, and have a *superfedeas*; but if the husband only be arrested, he shall put in bail for his wife as well as himself.

27. Plaintiff cannot except to bail after declaration delivered, unless delivered *de bene esse*; for by declaring he has admitted the bail to be sufficient.

Note: The delivery of a declaration before special bail is put in, is a waiver of

the bail; and if before bail is justified, it is an acceptance of them; but if delivered *de bene esse*, then it is only conditionally that good bail be put in, or the bail already put in do justify.

*Vide p. 73.
note 1.*

28. If the same persons who were bail to the sheriff become bail above, plaintiff is *not* at liberty to except against them *after* he hath taken an assignment of the bail bond.

29. One that is bail cannot be a witness for *defendant* upon a trial; but the court, on motion, will discharge such bail on putting in good bail in his stead.

A special bail piece.

Of the term of St. Michael, &c.

If an action of debt be brought upon a recognizance of bail on mesne process, there must be inserted the following *acetiam* bill (a) in the process, (though defendant is only to be served with a copy of such process); otherwise defendant or his attorney not bound to accept of a declaration in debt upon such recognizance. *Rule E. 15 G. 2.*

Middlesex, *A. B.* is delivered on bail, upon an arrest,
to wit,

To *C. D.* of, &c. in the said county, esq;
and

E. F. of, &c. in the county of *Kent*, gent.

S. G.

At the suit of *G. H.*

attorney.

acetiam bill (a) in the process, (though defendant is only to be served with a copy of such process); otherwise defendant or his attorney not bound to accept of a declaration in debt upon such recognizance. *Rule E. 15 G. 2.*

(a) And also to a bill of the said *A. B.* against the said *C. D.* in a plea of debt upon recognizance, according to the custom, &c. as in other *acetiams*.

The condition of the recognizance.

“ You (naming the bail) do jointly and severally undertake, that if the defendant *A. B.* shall be condemned in the action at the suit of the plaintiff *G. H.* he shall satisfy the costs and condemnation, or render himself into the custody of the marshal of the *Marshalsea* of this court, or you will pay the costs and condemnation for him.”

If on a *certiorari* you only say, "is delivered
" to bail upon a *certiorari*;" or, "a writ to
" cause proceedings to be certified to &c. —
" At the suit of the plaintiff in the plaint."

*An affidavit to be annexed to a bail piece
taken by commission.*

This affidavit
may be sworn
before the
commissioner,
who took the
bail.

In the King's Bench.

Between { A. B. plaintiff,
and
C. D. defendant.

T. B. of ———, in the county of ———,
maketh oath, that the recognizance of bail or
bail piece hereunto annexed was duly acknow-
leged by ——— (naming the bail) before E. F.
esq; the commissioner who took the same in this
deponent's presence, the ——— day of ———
last past.

Sworn, &c.

T. B.

Affidavit of justification of bail.

In the King's Bench.

Between { A. B. plaintiff,
and
C. D. defendant.

H. E. of ———, and J. D. of ———, the
defendant's bail in this cause, severally make
oath, that they these deponents are housekeepers
in ———, afore said; and that they are each of
them worth the sum of ——— and upwards, ex-
clusive of all debts or demands due from them
to any person or persons whatsoever.

Sworn, &c.

J. D. H. E.

F 4

Bail

The present Practice of the

Bail bond,

See *stat. 4 & 5 Ann. c. 16. f. 20.* *Assignment of bail bond.*] If bail be not duly put in, or if excepted against, the bail do not justify in time (see *p.*) the plaintiff may apply to the under sheriff for an assignment of the bail bond (a) (*Note*; every bail bond ought to be in *double* the sum sworn to and indorsed on the process.) Pay the sheriff in *Middlesex* 5*s.* *viz.* for the assignment 2*s.* 4*d.* for plaintiff's discharge for the same 2*s.* 4*d.* and for the return of the writ 4*d.* In other counties the fees differ, but not much.

(a) Or plaintiff may proceed against the sheriff by rules and attachment, as mentioned *p.* 73.

Action on bail bond.] The assignment being stamped with a double 6*d.* stamp, the plaintiff may take out a writ in his own name, and serve the bail with a copy thereof, for no special bail is required to such action, for that would be to have bail *ad infinitum*. Nor is the sheriff after the action brought answerable, though the bail are *insufficient*.

After bail bond forfeited, if the court of *your* stay the proceedings thereupon, defendant cannot afterwards plead in abatement to the original action, but must plead *in chief*. *Salk. 519.*

Terms on which Cur' will stay proceedings on the bail bond.] The bail, upon being served with a copy of the process, may take out a judge's summons for proceedings on the bail bond to be stayed, which the judge will order upon putting in good bail, paying the costs, receiving a declaration in the *original* action, pleading to issue, and taking short notice of trial; so that the issue may be tried the same term.

If the plaintiff has lost a trial, the court will further require, that the bail consent that judgment

ment be entered against them on the bail bond for the plaintiff's security; but in case the plaintiff might have had judgment against the defendant in the *original* action, if bail had been put in in time, the court will not then stay the proceedings on the bail bond.

N O T E S.

1. If plaintiff be dissatisfied with the bail given to the sheriff, and the same persons become bail above, plaintiff is not bound to accept them (a), but may enter an exception, and serve the sheriff with a rule to return the writ within six days after notice; and upon the sheriff's returning the writ, you may serve him with the like rule to bring in the body, according to the rule of *M. 6 G. 2.* (b). *Note*; where the sheriff hath taken insufficient bail, and defendant is at large, and the ret' of the writ is passed before he is served with the rule, he having no power to retake the defendant, he cannot comply with the letter of this rule; but the intent thereof is, that good bail be put in, or the sheriff will be liable to an attachment.

(a) If he has not taken an assignment of the bail bond.

Vide p. 70. note 28.

(b) *Vide p. 76. note 11.*

2. Where the sheriff hath a bail bond, upon an affidavit of the agreement of the parties, a special *supersedeas* has been granted to discharge the bail from the sheriff. *Vide Inst. Clericalis, part 1. p. 574.*

3. Upon a case at the assizes the question was, whether a bail bond was well assigned by the *under sheriff's clerk*. *Parker Ch. J.* said, he had had the advice of all his brothers, and they were of opinion, that an *under sheriff* himself might assign a bail bond in the name of the *high sheriff*, it having been the constant practice ever since the *stat. 4 & 5 Ann.* but that if the assign.

assignment was neither by the *high sheriff* nor his *under sheriff*, it would not be good, and that being the present case, the defendant had judgment. *T. 3 G. 1. Kitson and Fagg. Str. 60.*

The defendant was arrested upon a *lat'* issuing out of this court, which was issued out of term, and a bail bond given; and the plaintiff having pro-

ceeded upon the bail bond against the bail, it was moved, that they might be discharged; which *Cur'* ordered; for the first process being void, the whole proceedings upon it must be void also. *Hil. 12 G. 1. Buckridge v. Wright. M. S. Str. 399.*

5. No motion can be made to stay proceedings on a bail bond against the bail, unless bail be put in above; for until bail is put in above, the bail are not in court. *T. 12 G. 1. anon. M. S. Rep. 2.*

6. Debt upon a bail bond. Defendant traversed the arrest of the principal; and, on demurrer, judgment for plaintiff; for otherwise this will be a way to avoid all bail bonds that are *civilly* taken, without exposing the party by an arrest. *T. 7 G. 1. Watkins v. Parry. Str. 444.—M. 12 G. 1. Holly v. Fitz-Gerald. M. S. Rep. S. P.*

Lord Raym.

1455.

Fartesc. 366.

7. Action in debt brought in *London* upon bail bond given to the sheriff of *Surry*, and assigned at *London*. On demurrer it was objected, that the action was grounded on the bond

bond entered into by the bail, and that being laid to be done in *Surry*, the action should have been there. But *Cur'* held, that the assignment was the cause of action, and that therefore the action was well brought in *London*, where the assignment was made. *M. 13 G. 1. Gregson v. Heather. M. S. Rep. — Str. 727. S. C. — T. 13 G. 1. Norcroft and Mathews.* The same point ruled so again on the authority of this case. *Str. ibid.*

8. The writ was ret' on *Wednesday*, and the bail bond was assigned on *Monday* following. And *per Cur'*, this is irregular, for *Sunday* is not to be reckoned as a day being the last, and the defendant has all *Monday* to put in bail. *M. 1 G. 2. Studley v. Sturt. M. S. Rep. — Str. 782. S. C. and P. ibid. 914, M. 5 G. 2. Bullock v. Lincoln. S. P.* For the four days for putting in bail are to be the one *inclusive*, and the other *exclusive*.

The defendant has four days to put in bail, to be accounted from the return day, and *Sunday* is to be reckoned as one of the four days (a), where it only intervenes,

and is not the last day. *Per Cur'. Hil. 13 G. 1. Smith v. Braithwaite, M. S. Rep.*

(a) Writ ret' on a *Friday*, the bail bond cannot be assigned till *Wednesday*.

9. By *stat. 23 H. 6. c. 10.* Bail bonds must be taken in the sheriff's name, and as sheriff. On error *e C. B.* in actions of debt on bail bonds it was excepted, that it was not shewn that the bonds were to the sheriff by the name of office, as the *stat. 23 H. 6. c. 10.* requires. *Cur'* held, that it should so appear; but they thought it did sufficiently appear on the whole declaration, they being laid *solvend' eidem vicecomiti et assignatis.* Judgment affirmed. *Hil. 4 G. 2. Symes v. Oakes. Shepherd v. Oakes. Lavender v. Oakes. Str. 893.*

10. The

10. The bail to the sheriff may at the ret' of the writ put in bail before a judge (against the defendant's consent), in order to perform the condition of the bail bond; and then they may immediately take up the defendant, and surrender him in discharge of themselves. *M. 4 G. 2. Berchere & al' v. Coulson. Str. 876.*

11. Sheriffs, upon being served with a rule, *peremptorily* to return any writ issuing out of *B. R.* or to bring in the body within six days after notice, are to do so in the said time, otherwise they will be liable to an attachment without further rule. *Vide Rule M. 6 G. 2.*

*Comyns 264.
Gilb. Eq.
Rep. 84.*

12. The sheriff cannot take bail on an attachment, but a judge at his chambers may. So resolved by all the judges. *M. 8 G. 1. anon. Str. 479. [See note 14. this page.]*

13. In debt upon a bail bond the *memorandum* was of *Trinity* term. Exception, that the assignment appeared to be in *November* following. Plaintiff moved to amend. *Et per Cur'*: We cannot amend it, there being nothing to amend by; but gave leave to file a new bill of *Michaelmas* term, with a special *memorandum*; which the plaintiff afterwards did, and then amended of course upon payment of costs. *E. 10 G. 2. Russel v. Martin. Idem v. Thorpe. Str. 583.*

14. On a motion from an attachment the chief justice declared, that all the judges on consideration had resolved, that the sheriff could not take bail on an attachment, but a judge at his chambers might. *M. 8 G. 1. Anon. M. 13 G. 1. Rex and Bentley. Resolved accordingly. Str. 479. [See note 12. above.]*

15. There

15. There are no set forms of words for bail bonds, *ergo*, they need not pursue the words of the return of the writ; for if in substance they are to appear, according to the design of the writ, it is sufficient. *Vide Str.* 1155. In an action on a bail bond the arrest is not traverse-able. *Str.* 444, 643.

16. If the defendant neglects to put in bail, the bail bond is forfeited, though the plaintiff took no step to quicken him. *M. 20 G. 2, Merryman v. Carpenter. Str.* 1262.

Declaration.

A Declaration is the instrument containing the complaint of the party, comprehending the writ; and ought, in order to give the defendant an opportunity to make a proper defence, to contain *certainty*, according to a general intent, as to the *time, place, and quantity*.

By the 36 of *Ed. 3. c. 15*. It is ordained, that a count, which is the same with a declaration, shall be good, if it hath matter of substance, though the terms are not perfectly apt and proper.

Drawing and ingrossing declaration.] Ingross declaration on treble *1 d.* stamped paper. Charge on the back thereof *4 d. per sheet*, computing 72 words to a sheet (*a*), besides the duty; for warrant of attorney for defendant *4 d. (b)*, and for filing common bail for defendant, according to the *stat. 7 s. 2 d.* (*a*) *Vide Rule T. 12 W. 3.* (*b*) *Vide Rule M. 5 Ann.*

Delivering or filing declaration when defendant appears.] If defendant's attorney has appeared, plaintiff's attorney must deliver a copy of the declaration to him, and he must pay for the same

- (a) By a rule same duty and warrant (a), or on refusal by him or his clerk in his absence, or if his abode be unknown, it may be left in the office; and then on notice (b) thereof to defendant or his attorney (from the time of giving notice, and not before declaration is well delivered); and on a rule to plead given, and out, judgment for want of a plea may be signed, and no plea to be received till declaration, &c. paid for. *T. 12 W. 3. T. 2 G. 2.* -- If declaration is left in the office, and defendant's attorney pleads without taking it out, plaintiff need not take any notice of such plea, but may sign judgment.
- (b) The notice must be the same as after mentioned.

- (c) The notice must express the nature of the action, at whose suit prosecuted, and the time allowed for pleading. *T. 1 G. 2.*

Of delivering declaration when an appearance is entered according to the statute.] In all cases where a copy of the process is served, and common bail filed, according to the statute, a copy of the declaration must be left in the office, and notice (c) thereof given to defendant, or left at his last or usual place of abode; and from the time of giving notice, declaration is well delivered; and if defendant do not plead within the time limited (a rule to plead having been given and out), judgment may be signed without any other or further calling for a plea, and notice of executing a writ of inquiry of damages given. *T. 1 G. 2.* — But where the writ is returnable the first or second return of any term, plaintiff need not wait to see if defendant will file common bail; for he may file a declaration *de bene esse* at the return of the process, and give notice to plead, &c. as mentioned *p. 79.*

Of delivering a declaration on process, returnable the first or second return of any term, where plaintiff does not deliver a declaration de bene esse at the return of the process.] Upon all process, returnable the first or second return of any term, if plaintiff declares in London or Middlesex, and defendant lives within 20 miles of London, declaration must be delivered, with notice to plead within four days after delivery, in which time defendant must plead without any imparlance; and in case plaintiff declares in any other county, or defendant lives above 20 miles from London, declaration must be delivered, with notice to plead, within (a) eight days after the delivery thereof, in which time defendant must plead without any imparlance, or judgment may be signed. Rule T. 5 & 6 G. 2.—

(a) The four and eight days are exclusive of the day of the delivery of declaration.

Note; in both cases the declaration must be delivered at least four days before the end of the term, exclusive of the day of delivery, or defendant will be intitled to an imparlance.

Of delivering a declaration de bene esse.] Upon all process returnable the first or second return of any term, declaration may be delivered (b) de bene esse at the return of the process, with notice (c) to plead, if there be no affidavit of the cause of action filed, in eight (d) days after the delivery thereof; and if defendant doth not file common bail, and plead within that time, plaintiff, having filed common bail for him according to the statute, may sign judgment for

(b) The declaration is left in the office.

(c) Notice is given to defendant, as mentioned in p. 78.

(d) The reason defendant hath eight days to plead in this case is, because the defendant by the late act hath eight days after the ret' of the writ to file common bail, and judgment ought not to be signed till defendant is in court, which is by filing common bail.

want

want of a plea, a rule to plead having been duly entered. But if affidavit of the cause of action be filed, then in four days after the delivery, if the action be laid in *London* or *Middlesex*, and defendant lives *within* 20 miles of *London*; and in eight days if the action be laid in any other county, or defendant lives *above* 20 miles from *London*; and if defendant puts in bail, and does not plead in the said respective times, judgment may be signed, a rule to plead being duly entered. *M. 10 G. 2.* — *Note*; the plaintiff's attorney ought not to accept a plea if he dislikes the bail, for by accepting a plea he admits the bail to be good.

Of delivering a declaration when the process is not returnable on the first or second return of any term.] If the process be returnable on any other return than the first or second, defendant is intitled to an imparlance; and in such case the notice must be for defendant to plead *within* the first four days of next term.

Of delivering declaration by the bye.] Where the plaintiff in any action files common bail for the defendant, according to the statute, he may deliver a declaration by the bye against such defendant; but no other person, except such plaintiff, may deliver a declaration by the bye against any defendant, by reason of common bail being filed by such plaintiff. *Rule M. 10 G. 2.*

When the *defendant* has filed *common* or *special* bail for himself, any person may *deliver* or *file* a declaration against him by the bye, at any time during the term wherein the process against the

the defendant is ret' *sedente curia*; and the practice has been, that the plaintiff, at whose suit the process is, might declare against the defendant in as many actions as he thinks fit before the end of the next term, after the ret' of the process.

NOTES.

1. Where the declaration is *delivered* or *filed*, there ought also to be a bill filed with the clerk of the declarations. (Pay 4*d.*) This bill is the declaration ingrossed on parchment on a treble *d.* stamp. If no bill is filed it is error; but a bill is seldom filed (except where an attorney is defendant), unless a writ of error is actually brought, though charged for by the plaintiff's attorney, and allowed in costs.

A bill on parchment ought to be filed.

2. A declaration may be amended in matter of form after the general issue pleaded, and before entry, without paying costs, or giving an imparlance; but if amended in *substance*, plaintiff must pay costs, or give an imparlance (*a*); and if the amendment be in *substance*, after a *special* plea, plaintiff must pay costs, though he had rather give an imparlance.

Declaration amended, rule to plead, and pleading *de novo*.
(*a*) The election in amending, to pay costs or give an impar-

lance, is in the *defendant*, and not in the *plaintiff*. So ruled T. 6 G. 2. *Leebill v. Sir Thomas Reynell*. And said to be the practice in C. B. Str. 950.

3. In all cases of amendment after plea pleaded, defendant may plead again, and has two days after the amendment, and payment of costs, to plead *de novo*.

4. If a rule to plead be entered the same term the amendment is made, though before, it is good, otherwise a new rule must be entered.

If the issue be not entered on record, the declaration

5. Plaintiff after plea, or after the end of the second term, cannot add a new count as an amendment. See the *margin*.

may be amended according to the course of the court. *Per Holt Ch. J. M. S. Notes.* And if the defendant have costs for the plaintiff's mending the declaration after issue joined, he cannot plead anew to the declaration, but he may either take costs or plead. *Ibid.*

6. A bill on the file may be amended before plea, during the term of which it is filed, but not afterwards, without leave of the court.

(a) *E. 1 G. 2. Ld. Gage v. Robinson, in abatement. S. P. and determination.*

7. Declaration in replevin amended after plea in abatement (a). *M. 3 G. 1. Garner v. Anderson. Str. 11.* — The foundation of amendments by the court, whilst the proceedings remain in paper before they be recorded, is, that these papers, delivered to and fro, supply the declaring and pleading *ore tenus* at the bar, and may be amended as easily as if spoke at the bar. These faults, stiled errors of the clerk, are amendable after the proceedings are recorded. *Per Ch. J. Ibid.*

8. After a special demurrer, and joinder, and argument, the plaintiff had leave to amend by the bill upon the file. Granted upon debate. *M. 7 G. 2. Bishop v. Stacy. Str. 954.*

Two declarations refused to be consolidated.

Str. 1149.

9. Two declarations were delivered at the suit of the same plaintiff against the same defendants; one of them for a right of a way from one part of a close to one part of a town, and the other was for another way from another part of the close to another part of the town; and the court refused to consolidate them, because the plaintiff may be ready as to one, and not as to the other; and in the case of *Smith and Crabb*, for the same reason, the court refused

to consolidate several declarations in ejectments.

Hil. 16 G. 2. Mynot v. Bridge et al. Str. 1178.

10. In all actions upon the case, trespass, Of laying the assault, battery, &c. you are not obliged to lay day in a declaration, the certain day in your declaration, but may lay the day any time after the cause of action accrued, and before the effoin day of that term the declaration is of; but if the cause of action arises on some day within the term of which the declaration is of, then the declaration must be of some certain day in the term subsequent to the cause of action, as thus; viz. *Mich. term, to wit, on Monday next after, &c. in the ——— year, &c. and not of Mich. term generally (a).*

(a) The time alleged in the

declaration must not be subsequent to the bringing of the action. *Lucas 251.*

11. In *assumpsit* the day is not material, and the plaintiff may allege a different one in his replication. *T. 2 G. 2. Mathews v. Spicer. Str. 806.*

12. Where common bail is filed by the plain- Declaring by tiff's attorney according to the statute, that is the bye. not such a general bringing of defendant into court, as to warrant delivering a declaration by the bye. *H. 9 G. 2. Wallis v. Smith. Str. 1027. Sed vide rule M. 10 G. 2. p. 80.*

13. Plaintiff may discontinue either before or Disconti- after declaration delivered, by motion at the nuance, side bar (b), on payment of costs.

(b) Must be in court after

issue joined on demurrer.

14. If an infant declares by guardian or pro- Declaration chein amy, defendant need not plead until plain- by an infant, tiff produces the rule admitting him to declare by guardian, &c.

Venue.

Laying the venue in local actions.] All real and mixt actions, as *waste, ejectment, trespass* for breaking the close, cutting down trees, spoiling the corn, grass, &c. and *debt upon an escape*, are *local*, and must be laid in the county where the cause of action arose, or where the lands lie.

21 Jac. 1. 12.

If an action be brought against an officer for a matter relating to the execution of his office, the action must be laid in the proper county, or, if not, a verdict will be given for defendant for that reason; and an officer may plead the general issue, and give the special matter in evidence for any thing done in his office; and if plaintiff is nonsuited, or defendant found not guilty, he shall have *double costs*. — But if the officer, after his authority is expired, abuses the party, or if he meets a man and knocks him down, the action of trespass and assault is not confined to the proper county. *T. 7 G. 1. Str. 446.*

Debt lies for rent either in the county where the deed was made, or the land lies, if the action be against the *lessee*; but if brought [by or] against an *assignee*, it must be brought in the county where the land lies; for the *assignee* is chargeable only on the *privity* of estate, and not upon the contract. So ruled on demurrer.

T. 13 G. 1. Patterson v. Scott. M.S. Rep. Str. 776. S. C. and P.

All

All local actions must be laid in the county where the cause of action arises, or the lands lie, or defendant may *demur*.

Of laying and changing the venue in transitory actions.] All actions *personal*, where no possession is awarded, are *transitory*, and not *local*, as *debt*, *detinue*, *annuity*, *account*, *case*, &c. and may be commenced, and the declaration laid in such county as the plaintiff pleases.

But action upon the case, trespass for goods, assault, or imprisonment, and other *transitory* actions, (except *debt*, *scam' mag'*, *escape* (a), *deceit*, on a false return, against a carrier or lighterman, on the statute of usury, covenant (b), and it is said on a note, if not laid in their proper counties, on motion before plea pleaded, and affidavit that the action arose in the county of ———, and not in the county of ——— (where the action is laid), or elsewhere out of the county of ———, the court will change the venue. But if evidence necessary to support the action arises in two counties, the venue may be laid in either county; or if the plaintiff will be bound to give some material evidence in the county where a transitory action is laid, the court will not change the venue. — In *transitory* actions the venue may be changed upon oath, &c. though defendant come in by exigent. — *Vide* the rule of court made M. 1654. concerning the laying of *transitory* actions.

If a *transitory* action arise, part in one county and part in another, the plaintiff has election to lay it in which he pleases. No notice of motion to change venue, but you must serve plaintiff's attorney with a copy of the rule, and it is usual at the same time to deliver him the plea.

The present Practice of the

Sheriff may assign a bail bond out of the county, and the action may be brought where the assignment was made. *Str.* 727.

The defendant being arrested, and supposing the plaintiff would declare upon a battery, and lay it in a remote county, made affidavit before one of the judges of assizes (being a judge of this court), where the action was brought, that if any battery was committed upon the plaintiff by the defendant, it was in the county of —, and not elsewhere. This was before declaration; and after the plaintiff had delivered his declaration, the defendant moved to have the venue changed upon the affidavit made at the assizes, and it was granted. *T. 27 Car. 2. Porret v. Lee, in B. R. M. S. Rep.*

If the declaration be delivered so early in the term, that the defendant has 8 days in that term, he cannot move to change the venue the next term. *M. 6 G. 1. Asplin v. Gray. Str.* 211.

Defendant must move to change the venue before plea pleaded, and plaintiff must move to discharge the rule, on undertaking to give material evidence before replication or plea. So held *H. 3 G. 2. Dickinson v. Fisher. Str.* 858. The reporter says, *quæro tamen* as to the plea; for plaintiff may not have time, because defendant may give a plea at the same time he serves the rule to change the venue. *Ibid.*

Though a plaintiff cannot regularly move to change the venue, yet he may in effect do it by moving to amend; and it was done so in this case, by striking out *Dorsetshire*, and inserting *Middlesex.* *Hil. 15 G. 2. Stroud v. Tilly. Str.* 1162. and *Hil. 17 G. 2. In casu Rivet & al v. Cholmondeley & al.* Our suffered plaintiff to amend the venue, after defendant had changed it,

it, upon the common affidavit, on the authority of *Stroud v. Tilley*. *Ibid.* 1202.

Debt for rent laid in *London* on a *parol* demise *Fitz-Gibbon* of lands in *Kent*. *Cur'* refused to change the 166. *venue*, saying, *they never do it in debt*. *M. 4 G.*

2. *Dupleffis v. Cbalk*. *Str.* 878. *M. S. Rep.* S. C. And *P.* says the *Cb. J.* said, that in all actions of debt the *venue* is unchangeable. So on a false return.

Venue not changed to lose an assizes. *H.* 16 *G. 2.* *Str.* 1180.

In an action of *scandalum magnatum*, *Cur'* refused to change the *venue* from *Middlesex* to *Chester*, because it was to send it into a county palatine (a); and there was no instance of doing it in such an action. *T. 2 G. 2.* *Lady Falconbridge v. Forrest*. *Str.* 807. *Lord Raym.* 1418. (a) Motion to change the *venue*. The defendant

made oath, that if any such words were spoken, they were spoken in *Lancashire*, and not elsewhere. But the court said, they never used to change it in case of a county palatine. *T. 28 Car. 2.* in *B. R. anon.* *M. S. Rep.*

Motion to change the *venue* from *London* to the city of *Chester* upon a common affidavit. Insisted, that it was no objection that it was in a county palatine, for the court might send down the record thither by *mittimus*, and defendant could not plead to the jurisdiction of *this* court, it being *too late*. *Cur'* granted a rule *nisi*; but afterwards, upon plaintiff's undertaking to give material evidence in *London*, discharged it. *T. 12 G. 1.* *Godfrey v. Phillpot*. *M. S. Rep.*

Venue of a cause arising in *Wales* cannot be changed from one *English* county to another, without consent; (and *Denison J.* said it was denied to him. *M. 8 G. 2.* *Lloyd v. Williams*). *T. 19 G. 2.* *Moore v. Fernyhouth*. *Str.* 1258. 1 *Lord Raym.* 418.

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In case *Tindale v. Gwynne*, notwithstanding the above case of *Moore, &c.* a rule to shew cause, why the venue should not be changed from *London* to *Carmarthen*; which was afterwards made *absolute* on an affidavit of service. *Str.* 1270. Note; here seems to have been no opposition; Q. whether *Cur'*, if there had, would have granted it.

Cur' refused to change the venue into *Durham*, the judges not going thither in the *Lein* circuit. Then defendant offered to try it in *Yorkshire*, to which plaintiff not consenting, *Cur'* said they could do nothing in it. *M.* 18 G. 2. *Southouse v. Boak.* *Str.* 1216. *Cur'* for the like reason refused to change the venue into *Bristol.* *Hil.* 16 G. 2. *Howarth v. Willet.* *Str.* 1180.

Venue changed from *London* to *Middlesex.* *T.* 3 G. 2. *Gifford v. Lechmere.* *Str.* 857.

Venue changed from *Poole* to *Hampshire*, the corporation appearing to be interested. *T.* 4 G. 2. The mayor of *Poole v. Bennet.* *Str.* 874.

(a) Same privilege has a barrister or officer of the court.

(b) And the court will not change the venue.

(c) Or officer of the court.

(d) Where a barrister, attorney, or officer of the court, sue or are sued in *auter droit* as executor, &c. or jointly with unprivileged persons, then they lose their privilege. *Lord Raym.* 1556.

An attorney (a) has privilege to change the venue into *Middlesex*, as well as lay it here when plaintiff (b). *T.* 9 G. 2. *Wigley v. Morgan, &c.* *Str.* 1049. But a barrister or attorney (c) cannot change the venue into *Middlesex* where he is joined in an action with unprivileged persons (d). *M.* 11 G. 1. *Townsend v. Duppa et al.* *Ibid.*

A barrister has privilege (in a transitory action) to lay the venue in *Middlesex*; but a master in *Chancery* (as such) has not. *H. 2 G. 2. Burroughs v. Willis. Str. 822. 2 Lord Raym. 1556.*

After the effoin day of the subsequent term after appearance, plaintiff may not alter the venue, though he would pay costs or give an imparlance.

On causes removed out of cities or towns where justices of *nisi prius* seldom come, if the action be *transitory*, the venue must be laid in that county where the city or town lies. *M. 1654. sect. 9.*

E. 13 G. 1. in the case of *Crabtree and Moorcroft*, the court said, that since the *stat. (a) for Am. c. 16.* the amendment of the law, which directs that juries shall come a corpor' com', it seems unnecessary in the declaration to set forth a particular parish or vill for a venue. *M. S. Rep.*

A. borrowed money of the *Dutch West India* company, which he by articles covenanted to pay in bank at *Amsterdam*. The *Dutch West India* company sued those articles here in *England*, and laid the articles to be made at *Amsterdam* in *Holland*; viz. at *London* in the parish of *St. Mary le Bow* in the ward of *Cheap*. And per *Holt Ch. J. et totam Curiam*, this action being merely *transitory*, may be sued any where. *M. 11 G. 1. The Dutch West India company v. Jacob Senior Henriques van Moses, in C. B. Str. 612. Lord Raym. 1532. S. C.*

In an action of trespass and imprisonment for facts done in the *East Indies*, the plaintiff laid them all, being *transitory*, in *London*; and, *inter alia*, declared for seizing the plaintiff's house situate at *London aforesaid, in the parish and ward aforesaid*.

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aforesaid. Objected for defendant, that the trespass as to the house was *local*, and they could not give evidence of seizing an house in the *East Indies*. And *Eyre Ch. J.* refused to let the plaintiff give evidence as to the house, comparing it to the case of a rent of an house at *Barbadoes*, where it has been held, you may *bring covenant for the rent in England*; but an action of *debt*, which is *local*, cannot be brought here. *M. 12 G. 1. Shelling v. Farmer, at Guildhall. Str. 646.*

After defendant has changed the venue, he cannot plead in abatement. *M. S. Notes. 2.*

Affidavit to change the venue.

In the King's Bench.

Between } *A. B.* plaintiff,
 } and
 } *C. D.* defendant.

C. D. of ———, the defendant in this cause, maketh oath, that the cause of action, mentioned in the declaration delivered in this cause (if any such there be) did arise in the county of *N.* and not in the city of *L.* nor elsewhere out of the said county of *N.*

Sworn, &c.

C. D.

Rob

Court of KING'S BENCH.

91

Rule to plead.

Make up your paper of rules thus:

Michaelmas term, &c.

B. versus C. } To plead.
D. versus E. }

R. S. attorney.

Nov. 1759.

Carry this paper to the clerk of the rules; pay 1s. 10d. for each rule or cause. Defendant must plead within four days *exclusive* after the rule to plead is given. (*Rule T. 1 G. 2.*) Except in actions where eight days are allowed, and actions against prisoners,

T. 5 G. 2.
M. 10 G. 2.

Sunday, or any holiday on which the court does not sit, or office open, is to be accounted a day within the said rule, except it happens to be the last.

The declaration is sometimes delivered or left in the office, and notice given to plead when the rule to plead is not entered on the delivery, &c. of declaration; therefore it is proper to search when the rule to plead was given, or defendant may plead before he has occasion.

Where defendant is straitened for time to plead, he may take out a judge's summons for time, and serve plaintiff's attorney with a copy thereof.

If after four terms are elapsed declaration is delivered, defendant is to have a whole term's notice to plead, unless the cause has been stayed by *injunction* or *privilege*.

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A rule to plead may be given at any time in term, or within four days after the end of every term.

Demanding plea.

WHERE declaration is delivered to defendant's attorney, there must be a plea demanded of him by a note in writing.

If a plea is demanded after rule for pleading is out, the defendant has only till the afternoon of the next day to plead.

But where declaration is left in the office, and notice thereof given to defendant, there is no occasion to demand a plea.

If defendant is bound by rule or order of court to plead by such a time, he must plead accordingly, although plaintiff does not enter any rule to plead, or call for a plea.

Searching for plea.

BEFORE you sign judgment search the general issue book with Mr. Child; (you search here for defendant's name, as *A.* at the suit of *B.*) and if no plea there, search the plea book with the proper clerk of the papers. Here you search for plaintiff's name. If plaintiff's name begins with *A.* search for special plea or demurrer with Mr. Benton. If with *B.* you search with Mr. New; and so alternately thro' the alphabet.

Paying

Paying money into courts.

BRINGING money into court is often practised where a tender cannot be pleaded, and when the dispute betwixt the plaintiff and defendant is only how much is due to the plaintiff, and not whether any thing at all is due to him.

The defendant after declaration delivered, and before he pleads, may move for leave to pay into court a certain sum of money (the sum really due to the plaintiff), which the court will order accordingly.

tion; but it may be before. *Per Cur'. E. 1 W. & M. in B. R. M. S. Notes. Sed vide postea.*

Having obtained the rule, you pay the money to Mr. Heberden the signer of the *lats'*, who acts in this case as agent to the secondary (a); and who, according to the rule *Hil. 5 Jac. 1.* takes 20 s. for every 100 l. and according to that rule for every greater or lesser sum of money. Under 10 l. he takes 2 s.

After you have paid the money to Mr. Heberden, you serve a copy of the rule on plaintiff's attorney, giving him at the same time the general issue; and if the plaintiff accepts the money in full discharge of the suit, he shall have costs to the time the money is paid in. But if he will not, he may take the money out of court in part of his demand, and proceed to trial. But if on the trial he does not recover a greater sum than the money paid into court, he will be nonsuited, and must pay costs to the defendant.

After a plea pleaded, money cannot be brought into court, and struck out of the declaration.

(a) The secondary, by rule *E. 5 Jac. 1.* is the proper officer appointed to pay the money to.

Note;

Note; No sum of money, how small soever, can be paid into court without leave to be obtained for that purpose on motion.

NOTES.

*Stat. 4 & 5
Ann. c. 16.*

1. Pending an action upon a bond, the defendant may bring into court principal, interest, and costs; and the court will give judgment to discharge the defendant from the same.

2. In trover for *money*, the court gave leave to bring the whole money declared for into court; but said, they would do it only in this case, and not in trover for *goods*. *Hil. 5 G. 1. anon. 142.*

3. The mortgagee after the day of payment brought an ejectment; and the court ordered him to shew cause why, on payment to the lessor, or bringing into court *principal, interest, and costs*, proceedings should not be stayed. And *Denton*, who moved it, said, it was done often in *C. B.* *Hil. 7 G. 1. anon. Str. 413.*

*See p. 95.
par 7.*

4. The defendant was bound to pay a sum of money by installments at *5 l. per annum*; and having failed at one of the days, the plaintiff brought his action for the penalty. Defendant moved upon the act for the amendment of the law, that upon paying the *5 l.* and costs, proceedings might be stayed. *Sed per Cur'*; we cannot do it; for it never was the intent of the obligee, that he would be put to so many actions as one a year. *E. 8 G. 1. Laud v. Harrison. Str. 515.*

Str. 787:

5. The court refused to grant a rule for the defendant to bring money into court, in an action

on

on the case brought against him for immoderately using the plaintiff's chaise, so that it was spoiled. And *Raymond* Ch. J. said, that the first time this court ever allowed money to be brought in in actions for goods sold and delivered, was when *Kelyng* was Ch. J. and the reason why the court indulged defendants in this liberty in actions of this kind, was to save them from the difficulty of pleading tenders. T. 13 G. 1. *White v. Woodhouse. M. S. Rep.*

6. The condition of a bond was to pay 40*l.* by 5*l. per annum*; and the defendant had leave to bring the arrears of the 5*l. per annum* into court on the act for the amendment of the law. M. 2 G. 2. *Str.* 814.

7. A bond was conditioned to pay 100*l.* by several installments, and the first payment not being made, the bond was put in suit. Defendant *before judgment* moved to bring in the first payment with interest and costs, which the plaintiff was willing to accept, but insisted, that, as the bond was forfeited, he had a right to sign his judgment, and submitted to be bound by rule not to take execution for more than was at present due, till another payment should accrue. Defendant insisted, that by 4 *Ann. c. 16.* he was at liberty to bring in the money at any time pending the action. *Sed per Cur'*, that plainly relates to the case of *bringing in all the money reserved by the condition, because it says the bond shall be discharged.* However, within the equity of that statute, it has been allowed to bring in the money on installments. But then it is reasonable we should take care not to prejudice the plaintiff, who will have a *legal* advantage by signing judgment. Therefore let him sign his judgment, but not to take out execution until

until the payments become due. *M. 7 G. 21 Darby v. Wilkins. Str. 957. — N. B. M. 11 G. 2. Lucas v. London.* Held, paying all the past installments, with interest and costs, sufficient; and money not yet due ordered out of court to the party who brought it in. *Ibid. 958.*

8. The defendant pleaded a tender with a *proferet in curia* of the money; and on a certificate that no money was paid in, *per Cur'*, it is no plea, and the plaintiff might have signed judgment. *M. 12 G. 1. Pether et al' v. Shelton. Str. 638.* The report says, that he did not venture to advise his client to do this, because in another case this term, where a plea in *abatement* was put in without *affidavit*, and the plaintiff signed judgment, the court set it aside. *Ibid.*

9. In a special action upon the case for immoderately driving a chaise let to hire, *Cur'* refused to let the defendant bring money into court, and discharged a rule which had been obtained as of course for that purpose. And the *Ch. Justice* said, the first motion to bring money into court was in *Kelyng's time*, and introduced to avoid the hazard and difficulty of pleading a tender. *M. 1 G. 2. White v. Woodhouse. Str. 787.*

10. Held on consideration, that money may be brought into court at the suit of an executor; and that the effect of it would be, not to make the executor pay, but only lose his subsequent costs. *E. 1 G. 2. Crutchfield v. Scott. Str. 796. M. 3 G. 1. Baker v. Turberville,* allowed so to do. *Ibid.*

11. After judgment against the casual ejector, and before any writ of possession executed, the

court

court made a rule to stay proceedings, on payment of all rent due and costs, it not being pretended, that the ejectment was brought on any other title than a re-entry for non-payment of rent. *E. 4 G. 2. Goodtitle v. Holdfast. Str.*

900.

12. No bringing money into court in debt. *Hil. 4 G. 2. Leapidge et al' v. Pengillionne. Str.*

890.

13. In an action for *dilapidations*, the court refused to let the defendant bring money into court, and said, it was like *trespass* where you cannot do it, though you may tender amends. *T. 5 G. 2. Squire v. Archer. Str.*

906.

14. In *assumpsit* the defendant pleaded a tender of four guineas, and brought the money into court, the plaintiff replied a subsequent demand and refusal; which, on issue joined, was found for the defendant; who thereupon moved the court to have his four guineas again, which was refused; for it is admitted so much is due to the plaintiff, and it is the same as if the money had been brought in on the common rule to strike it out of the declaration. *Hil. 9 G.*

2. *Cox v. Robinson. Str.*

15. No bringing money into court in *trover*; for the action is not for the *thing*, but damages; and they may not now be in as good a condition as they were before. *T. 6 G. 2. Olivant v. Perineau. Str.*

1191.

16. In debt for the penalty of 5*l.* in killing an hare, with no other count, the court let the defendant bring in the penalty and costs. *M.*

18 G. 2. *Webb qui tam v. Punter. Str.*

17. If the costs are not paid on bringing money into court, the plaintiff must go on,

Hil. 2 G. 2. Bowington v. Parry. In trover for a laced head, motion to bring it into court, but denied. Str.

822;

and cannot have an attachment. *Hil. 18 G. 2. Hand v. Lady Dinely. Str. 1220.*

18. *Cur'* gave leave to withdraw the general issue, in order to bring money into court, and replead it, within the reason of *Blackbourn v. Matthias (a)*, not delaying the plaintiff. *T. 21 G. 2. Tarlton v. Wragg. Str. 1271.*

(a) *Vide 2 Str. 1267.*

Oyer.

THE defendant is not bound to plead to a declaration by original, till oyer and a copy of the original is given him if he demands it.

If the plaintiff in his declaration shall make a *profert in curia* of any deed or other writing, letters of administration, or the like, the defendant may pray oyer thereof, and must have a copy delivered to him, paying for the same after the rate of 4d. per sheet (b), besides stamp duty, and shall have such time after to plead as he had when he demanded oyer.

(b) 4d. per sheet in all cases for copy, &c.

If defendant in his plea make a *profert in cur'* of any deed, &c. plaintiff may pray oyer thereof, and shall have a copy, paying as above, and the same time to reply after he receives it, as he had at the time of demanding oyer.

NOTES.

1. Declaration upon bond is for 50l. defendant prays oyer, and it is entered *quantoginti*; the defendant demurs for variance. *Cur'* bring in the bond, and if that be right, we will amend the oyer. *Anon. Hil. 27 & 28 Car. 2. M. S. Rep.*

2. The

2. The plaintiff declared in covenant, making a *profert* of the counterpart executed by the defendant, and assigned the breach in non-payment of rent. The defendant demanded *oyer*, and upon search the plaintiff could not find it; and, upon affidavits of his inability to give *oyer*, applied to the court to dispense with it, the defendant having the original lease, and therefore not inconvenient. But the court on consideration declared, they could not do it; the plaintiff was bound to make a *profert*, else his declaration would be demurred to. The defendant is by law intitled to *oyer*, and the denial of it would be error. They said this does not depend upon any particular rule of court, but on the general right of law, which the court cannot dispense with. 1 *Mod.* 266. It was the plaintiff's fault to bring the action before he had the *deed*, or a proper discovery. And it is not like the case of a *defendant* whose deed is in the *plaintiff's* hands, where the court will grant imparlances from time to time, until it is produced. *E. 16 G. 2. Sorelby v. Sparrow.* Str. 1186.

3. In debt upon bond, the defendant craved *oyer*, which the plaintiff was not able to give him, the bond being in the hands of Mr. *Strickland*, a gentleman of the bar, who had refused to produce it, and enable the plaintiff to force the defendant to plead. The court being moved against Mr. *Strickland*, his excuse was, that the bond was left with him to wait the event of a suit depending. *Et per Cur'*; that is a matter the defendant may avail himself of by plea, and we will not determine it upon motion. There must be a rule on Mr. *Strickland* to give *oyer*.

The present Practice of the

oyer of the bond, and produce it at the trial, if required by the plaintiff. *M. 17 G. 2. Str. 1198.*

4. Defendant who has *oyer* is not bound to insert it in his plea. *Str. 1241.*

5. It was settled, that if the defendant craves *oyer* of any thing whereof he is intitled to have *oyer*, and it is not delivered in time, he shall have so many days to plead after the rules are out, as he demanded *oyer* before the rules were out. *T. 12 G. 1. Powel v. Gay. Str. 705.*

Pleas.

General issue.] You enter it in a book kept for that purpose by Mr. *Child* at the King's Bench office. Pay 4 *d.* or you may write it on a treble 1 *d.* stampd piece of paper, and deliver it to plaintiff's attorney.—When plaintiff's attorney finds the general issue entered with Mr. *Child*, he writes it in form after declaration (a), and delivers the issue to defendant's attorney.

(a) You pay plaintiff's attorney 1 *s.*

for entering general issue (or plea) of *non assumpsit*, &c.

Special pleas.] Special pleas are also to be written on treble 1 *d.* stamped paper, and signed by counsel (rule *E. 18 Car. 2.*) and if *dilatory*, affidavit of the truth thereof must be annexed,

(b) The *stat. 4 & 5 Ann.* for the amendment of the law, says, that no *dilatory* plea shall

(b) special pleas must be left with the clerks of the papers, and not delivered to the attorney; and the clerks of the papers are to make copy thereof. *Rules T. 2 Jac. 1. T. 16 Car. 2. Mich. 2 W. & M.*

be received in any court of record, unless the party, offering the same, doth by affidavit prove the truth thereof, or shew some probable matter to the court to induce them to believe that the fact of such *dilatory* plea is true.

The

The form of the affidavit on pleading a dilatory plea.

In the King's Bench.

A. B. against C. D.

C. D. the defendant in this cause, maketh oath, that the substance and matter of fact, in the plea hereunto annexed, is true.

When to plead.] When to plead in general cases. See title *declaration*, p. 79.

When to plead in particular cases.] Pleas to the jurisdiction of the court or in abatement (c) (c) A plea of antient demesne, being a plea to the jurisdiction of the court, is not a plea in abatement within the act for the amendment of the law. ought to be pleaded before the rules for pleading are out, and cannot be pleaded after a common imparlance, unless the declaration be delivered in the vacation, or so late in the term, that defendant is not bound to plead to it that term; in both which cases defendant may, within the first four days of the next term, plead to the jurisdiction; or in abatement, as of the *preceding* term; but if such plea be not delivered or left in the office in time (whether a rule to plead be given or not), such plea is not to be received, and *Sunday*, or any other day on which the court doth not sit, is to be accounted as one of the four, unless it be the last.

No man can plead to the jurisdiction of the court after an imparlance; for by the imparlance it is acknowledged. *Per Holt Ch. J. M. S. Notes.*

If declaration be delivered before the effoin day, the defendant hath four days in court to plead in abatement, as of the precedent term. *M. S. Rep.*

The present Practice of the

Every plea of *tender*, or when defendant alleges he was *always ready* to do any particular act, must be pleaded in like manner as pleas in abatement.

If it be a plea of *tender*, the money must be brought into court, and the receipt of the proper officer be wrote on the plea before it is filed. See *Rule Hil. 5 Jac. 1.*

If any deed, writing, or letters of administration, or the like, be set forth with a *profert in Cur'*, defendant may demand *oyer*, and must have a copy thereof delivered him on a treble 1*d.* stamp, paying 4*d.* per sheet, besides duty; and shall have such time to plead after the delivery as he had when he demanded *oyer*.

If plaintiff amends his declaration, defendant shall have two days, *exclusive* of the day of amendment, to alter his first plea, or to plead any other. [*Vide tit. declaration, p. 81, note 3.*]

NOTES on pleading.

Bail cannot plead the *non-responder* of the principal in abatement, though principal may. 3 *Mod.* 289.

1. A general plea is a concise direct answer to the plaintiff's declaration. — Special pleas, which set forth the matter at large, are of two sorts; viz. pleas in *abatement* and *bar*. — A plea in abatement is not a plea to the action but to the *bill* or *writ*; if by original, pleas in abatement may be called *temporary*, for they do not destroy the action, but only stop it for a time, until the obstacle pleaded be removed. As to plead that the plaintiff is excommunicated, or is outlawed, that doth not destroy the action, but only suspend it till the plaintiff takes off his excommunication, or reverse the outlawry, and then

then he may proceed in his action. — Or that the plaintiff is an alien enemy; for he may be made a free denizen, or naturalized, and then the obstacle is removed. — In case of a *misnomer* of the defendant's Christian or surname, or naming him executor when he is administrator, the plaintiff may bring a new action without paying costs, by the right name, or as administrator.

2. *Pleas* in abatement are for many causes: For instance, to the name, addition, death, covert baron; for that the plaintiff is an alien enemy, is outlawed, or excommunicated, privilege in the defendant as being an attorney of the Common Pleas, and therefore ought not to be sued in the King's Bench, except plaintiff be an attorney of *B. R.* variance between the original and the declaration; for that the testator made two executors, and but one is named in the bill; for infancy in the plaintiff or defendant; other actions depending; for *misnomer, cum multis aliis*.

3. A plea in bar is to the action, and destroys it for ever. A release, an acquittance, acceptance of another thing, statute of limitations, and many other matters, are pleadable in bar. *Note*; pleas in abatement conclude to the bill or writ, and pray that the same may be quashed.

4. *Pleas* in bar conclude to the action, and pray judgment, whether the plaintiff ought to have or maintain his action thereupon, against the defendant.

5. Where an action of *debt* shall be brought *Vide stat. 4 & 5 Ann. c. 16.* upon any *single* bill, or action of debt, or *sci. fa.* upon a judgment, if the defendant hath paid the money due upon such bill or judgment, such payment shall and may be pleaded in bar;

and where debt is brought upon a bond with a condition, payment *after* the day is made good. *If any interest be paid upon an old bond after the day, it must be a plea upon the statute; To a bond of thirty years standing, the defendant pleaded solvit ad diem, and relied upon the presumption. The plaintiff could only prove payment of interest two years after the time mentioned in the condition, but gave no evidence of any receipt or demand for 28 years past. The Ch. J. was of opinion, that this plea of payment at the day was to be taken as strictly in this case, which went upon the presumption, as in any other case; and the plaintiff having falsified the plea, by shewing payment of interest two years after, it was not enough to say, the other 28 years were enough to let in the presumption; because, to take advantage of that, the defendant should have pleaded upon the act for the amendment of the law, that he paid money after the day; in which case it would have been with him upon this evidence. M. 12 G. 1. Moreland v. Bennett. In Middlesex, coram Raymond Ch. J. Str. 652.*

6. If defendant hath pleaded to issue, and plaintiff does not enter the issue the same term it is joined, defendant may, within the first four days of the ensuing term, waive or alter his plea or demurrer. 2. If he can waive the general issue? See p. 109, note 33.

7. No need of affidavit of facts to plead several pleas; but Cur^r must be moved.

8. The general issue cannot be waived, *See vide p. 109, note 33.* special plea or demurrer may.

9. If a judgment, or matter of record, in the same court be pleaded, the term and number of the roll must be given, if demanded, or the plea is not to be received.

10. In case of a *dilatory* or *frivolous* plea, Cur^r will order defendant to stand to his plea, or plead *peremptorily* on the morrow, or if towards the end of the term *instantly*, that plaintiff may have time to give notice of trial. The same practice with regard to *frivolous* demurrers.

11. Defendant, when bound to plead an issuable plea, may demur to plaintiff's replication.

12. In pleading a general statute, the statute not to be recited.

13. By the *stat. 4 & 5 Ann. c. 16.* It is enacted, "That any defendant or tenant in any action or suit, or any plaintiff in replevin, in any court of record, may, with leave of the same court, plead as many several matters thereto, as he shall think necessary for his defence."

"Provided nevertheless, that if any such matters shall, on a demurrer joined, be adjudged *insufficient*, costs shall be given at the discretion of the court; or if a verdict be found, upon any issue in the said cause, for the plaintiff or demandant, costs shall also be given in like manner; unless the judge, who tried the said issue, shall certify that the said defendant, or tenants, or plaintiff in replevin, had a probable cause to plead such matter, which upon the issue shall be found against him."

14. In debt for rent, leave was given to plead a tender and *eviction*.

15. Outlawry reversed, not to be pleaded a second time.

16. An infant must be admitted to plead by guardian. *Vide tit. guardian, p.*

17. Giving a note for 5*l.* cannot be pleaded as a satisfaction for 15*l.* *E. 7 G. 1. in error. Cumber v. Wane. Str. 426.*

18. If defendant in debt upon a bond would take advantage of another's being *jointly* bound, he must plead it in *abatement*, and cannot demur upon oyer; for, if he does, *Cur'* will presume

sume the other did not seal it. There was a demurrer here, and plaintiff had judgment. *Hil. 8 G. 1. Gllbert v. Bath. Str. 503.*

19. Matters of record pleaded by way of dilatory, if of another court, must be pleaded *sub pede sigilli.* *Str. 520.*

20. Replication *non est attorn'* must not conclude *al pais.* *Str. 532. Vide next ca.*

21. In *C. B.* the defendant, after special imparlance, pleaded his privilege of an attorney of *B. R.* The plaintiff replied him not an attorney, and concluded to the country. And on demurrer judgment in chief is entered for the plaintiff, but reversed on error; because, upon a demurrer, the most the plaintiff could have, was a *respondes auster.* *Et per Cur'*; that there must be in this case, because though the replication is ill in concluding to the country, yet the plea is ill too, as coming after an imparlance, though it be a special one. *M. 9 G. 1. Banker v. Forrest. Str. 532.*

22. It was settled on demurrer, that a tender is pleadable to a *quantum meruit*; (and said to have been so held before in *B. R.* 10 *W. 3. Giles v. Hart. Salt. 622.* *M. 10 G. 1. Johnson v. Lancaster. Str. 576.*

23. In a *quantum meruit* the defendant pleaded a tender on the 4th of May, *ante diem exhibitionis billæ.* Plaintiff replied, *non obtulit ante diem, &c.* and, to oust defendant of the benefit of the plea, made up the book with a general memorandum that would refer to the first day of the term, which was before the 4th of May. Motion on affidavit, that the tender was upon the 4th, and no writ taken out till the 6th of May, that the plaintiff might be obliged to make his memorandum special, according to the

truth of the fact, and after to shew cause, —
the same was ordered accordingly. *M. 12 G.*

1. *Smith v. Key. Str. 638.*

24. A plea of privilege of clerk to a prothonotary in *C. B.* was set aside, the affidavit annexed to it being, *that this is a true plea*, and not *that the plea is true*, the statute requiring the affidavit should *establish the fact*, and not the *legality of the plea*. *T. 12 G. 1. Onslow v. Booth. Str. 705.*

25. Action by original in *B. R.* defendant on *oyer* pleaded in abatement, that the writ was never returned. But, the plea not being verified by affidavit, it was set aside. *M. 12 G. 1. Sherman v. Alvarez. Str. 630.*

26. Defendant pleaded his privilege as a serjeant, with a writ annexed; but, for want of an affidavit that *he had business there, and there only*, the court set it aside. *Hil. 13 G. 1. Stiles v. Mead. Str. 738.*

27. Coverture of the defendant *after the Lord Raym.*
action brought cannot abate the plaintiff's writ. *1525.*
The plaintiff *Jones* declared in *B. R.* against *Judith Parnell*, upon several promises. She appears by attorney by the name of *Judith King*, and pleads *non assumpsit*. And after a verdict for the plaintiff, she and *Edward King* bring a writ of error *coram nobis*, and assign for error, that she has *appeared and pleaded as a feme sole*, whereas at the *time of her appearance and plea*, she was married to the said *Edward King*. The defendant in error pleads, that this *Edward King*, and one *John Kitson*, became bail for her as for a *feme sole*, and so relies on it by way of estoppel, that they shall not be admitted to aver against the record. To this the plaintiff in error demurs. *Per Cur'*; the act of the defendant

defendant was never allowed to abate the plaintiff's writ. We must take it, that, at the time of bringing the action, the defendant was a feme sole, because they pretend to carry it back no farther than the appearance. And plaintiffs would be in a fine condition, if, after they have arrested a woman, she shall be allowed to overthrow their proceedings by a *subsequent* marriage. Judgment affirmed. T. 2 G. 2. *King & ux' v. Jones.* Str. 811.

28. A tender of more than due is good, but a tender of too little is bad; and where a man does not know *exactly* what is due, he must at his peril take care to tender enough. Said per Cur'. M. 5 G. 2. in *Astley v. Reynolds.* Str. 916.

In an action by original against defendant as of such a place, yeoman, he pleaded in abatement, that he was a *lime merchant*, and not a yeoman; and on de-

murrer the court held it an ill plea, and awarded a *respondes ouster* upon this ground, that every man, be he a trader or not a trader, has a degree by which he may be noted, and having a degree (if he has a trade likewise), it is in the election of the plaintiff to sue him by one or the other; and if he sues him by his degree, it is not enough for the defendant to say he is of such a trade, because he does not give the plaintiff a better writ. In this case therefore the defendant should have shewn himself to be of a degree higher than a yeoman, and that would have abated the plaintiff's writ, and have given him a better. This was ruled upon the authority of a former case, where a man was sued as yeoman, and he pleaded he was an horner; and the court awarded a *respondes ouster*. T. 9 G. 1. *Horspool v. Harrison.* Str. 556.

30. Leave was given to plead *non est factum*, and a discharge by a commission of bankruptcy. T. 4 G. 2. *Atkinson v. Atkinson*. Str. 871.

31. Leave was given to plead *non assumpsit*, and *non assumpsit infra sex annos*, on solemn debate in B. R. because thereby defendant secured to himself a trial upon the merits in all events; whereas if he was to rest only on the *non assumpsit infra sex annos*, it might come to a demurrer, or the issue of *nil nil record*; though this was refused in C. B. the last term, because the *non assumpsit infra sex annos* puts all in issue, and does not imply a promise *without* the six years. Hil. 4 G. 2. *Da Costa v. Carteret et al*, in B. R. Str. 889.

32. Cur' refused to let defendant plead *non assumpsit* and a tender. E. 6 G. 2. *Baker v. Westbrook*. Str. 949.

33. Leave was given to waive the general issue, and to plead *double*. T. 5 G. 2. *Meard v. Philips*. Str. 906. In Hil. 7 G. 2. *Law v. Law*. Cur' refused to give leave to withdraw a *special* plea, in order to plead *another special* plea, saying, it was never done but in order to plead *the general issue*. *Ibid*. 960.

34. In debt on bond for performance of covenants, defendant pleaded *nil debet*, to which there was a demurrer and joinder in demurrer. Upon defendant's consenting to put the plaintiff into as good a condition as if he had pleaded right at first, Cur' permitted him to waive his first plea, and plead performance of covenants. Hil. 16 G. 2. *Herbert v. Griffiths*. Str. 1181.

35. Pleas in abatement must come in within the first four days, and cannot after, as pleas in chief may. T. 16 G. 2. Str. 1192.

36. In

36. In an action for words, defendant pleaded *not guilty*, and offered to prove the words to be true, in mitigation of damages; but refused; for it should have been pleaded, whereby plaintiff might be prepared to defend himself, as well as to prove the speaking of the words. This is a *general* rule, and extends to all sorts of words. *M. 17 G. 2. Underwood v. Parker. Str. 1200.*

It was held, that the statute of limitations may be *replied* to a set off. *T. 21 G. 2. Remington v. Stevens. Str. 1271.*

37. Rule for defendant to plead as he will stand by, &c. must be served on his attorney, who need not take any notice thereof if defendant will abide by his first plea. *Vid. Str. 1234. T. 18 G. 2.*

38. Held *M. 19 G. 2.* that defendant who has oyer is not bound to insert it in his plea, but may plead the general issue. *Str. 1241.*

39. On a writ and declaration of this term, and an eight days rule to plead given, defendant at the end of the eight days put in a plea in abatement, which *Cur'* set aside; for they only give that time to plead in chief, and never intended to enlarge the time for a dilatory plea. *E. 20 G. 2. Anderson v. Beddislade. Str. 1268.*

40. The court refused leave to plead *nil debit*, and a former action depending in a *qui tam*; for these actions are excepted out of the act for the amendment of the law. *T. 13 G. 1. Webb v. Umlin. M. S. Rep.*

41. To an action of debt upon a bond, the defendant pleads in *bar*, that the bond was executed by another person jointly with him. To which the plaintiff demurred generally. And the court held this matter pleadable only in
abatement,

abatement, and not in bar; and though the demurrer was general, yet the court held it good; for pleas in abatement are not within the statute, which requires causes of demurrer to be specially assigned. Hil. 13 G. 1. Watts v. Goodman. M. S. Rep.

General issue of non est factum to a bond.

AND the said C. D. by R. S. his attorney, comes and defends the force and injury, when, &c. and says, that he ought not to be charged with the said debt by means of the said writing obligatory, because he says, that the said writing obligatory is not his deed; and of this he puts himself upon the country.

Nil debet.

AND the said C. D. by — his attorney, comes, &c. when, &c. and says, that he does not owe to the said A. B. the aforesaid — l. or any part thereof, in manner and form as the said A. B. above complains against him; and of this he puts himself upon the country.

Non assumpsit.

AND the said C. D. &c. (as before), and says, that he did not undertake in the manner and form as the said A. B. above complains against him; and of this he puts himself upon the country.

Ne-

Non cul' in case.

AND says, that he is nothing guilty of the premisses above laid to his charge, as the said *A. B.* above complains against him; and of this he puts himself upon the country.

Non cul' in trespasss.

AND says, he is not guilty; and of this he puts himself upon the country.

Son assault.

AND the said *C. D.* by —, his attorney, comes and defends the force and injury, when, &c. and as to the coming with force and arms, or whatsoever that is against the peace of our lord the now king, the said *C.* says, that he is not guilty thereof; and of this he puts himself upon the country. And the said *A.* likewise, &c. And as to the residue of the trespasss above supposed to be done, the said *C.* says, that the said *A.* ought not to have or maintain his said action thereof against him, because he says, that the said *A.* at the said time in which the said trespasss is above supposed to be done, at — in the county aforesaid, with force and arms, &c. made an assault upon the said *C.* and then and there would have beaten, wounded, and ill treated, the said *C.* if he the said *C.* had not then and there presently defended

defended himself against the said *A.* whereupon the said *C.* then and there defended himself against the said *A.* and so the said *C.* says, that the mischief or damage, if any then and there happened to the said *A.* it was on the proper assault of the said *A.* and in the defence of the said *C.* And this the said *C.* is ready to verify; wherefore he prays judgment, whether the said *A.* ought to have or maintain his said action against him.

And the said *A.* says, that he ought not, by Replication *de* any thing by the said *C.* above by pleading al- *injuriam suam* leged, to be barred from having his said action *propria.* for the residue of the said trespass against the said *C.* because he says, that the said *C.* on the day and year aforesaid, in the said declaration mentioned, at — aforesaid, in the county aforesaid, of his own proper injury, without any such cause as by the said *C.* is above by pleading alleged, made an assault upon the said *A.* and beat, wounded, and ill treated him the said *A.* in manner and form as the said *A.* above thereof complains against the said *C.* And this, he prays, may be inquired of by the country; and the said *C.* likewise, &c. Therefore, as Issue, well to try that issue as the said other issue above joined between the parties, let a jury come thereupon before our lord the king at *Westminster*, on —, next after —; and who are in no-wise a-kin either to the said *A.* or to the said *C.* to take cognizance, upon their oaths, of the whole truth of the premises; because as well the said *C.* as the said *A.* have put themselves upon that jury. The same day is given to the parties aforesaid at the same place.

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Plene administravit by an executrix.

AND the said *B.* by — her attorney, comes and defends the force and injury, when, &c. and says, that the said *A.* ought not to have or maintain her said action thereof, against her the said *B.* because she says, that she the said *B.* hath fully administered all and singular the goods and chattels, which were the goods and chattels of the said *C. D.* at the time of his death, in her hands to be administered; and that she the said *B.* has not, nor at the time of exhibiting the bill aforesaid, or at any time since, had any goods or chattels, which were the goods and chattels of the said *C. D.* at the time of his death, in her hands to be administered; whereby the said *A.* might have been satisfied of the damages aforesaid, or any part thereof; and this she the said *B.* is ready to verify; wherefore she prays judgment, whether the said *A.* ought to have or maintain her action aforesaid thereof against her, &c.

Replication.

AND the said *A.* says, that she, by reason of any thing by the aforesaid *B.* above by pleading alleged, ought not to be barred from having her said action against her the said *B.* because she says, that the said *B.* has, and at the time of exhibiting the bill aforesaid, that is to say, on the — day of —, in the — year of the reign of our sovereign lord *George the second, king of Great Britain, &c.*

at *Westminster*, in the county aforesaid, had divers goods and chattels, which were the goods and chattels of the said *C. D.* at the time of his death, in her hands to be administered, sufficient to satisfy the said damages, whereof she the said *A.* might have been satisfied her damages aforesaid. And the said *A.* prays, that this may be inquired of by the country; and the said *B.* likewise, &c. Therefore let a jury come thereupon before our lord the king at *Westminster*, on — next after —, and who are in no-wise a-kin either to the said *A.* or to the said *B.* to take cognizance, upon their oaths, of the whole truth of the premisses, because as well the said *B.* as the said *A.* have put themselves upon that jury. The same day is given to the parties aforesaid at the same place.

Issue.

Venire

awarded.

Mutual debts.

Stat. 8 G. 2.

MUTUAL debts may be set off against each other, by being *pleaded in bar*, or *given in evidence*.

The best way is to plead it in bar; but if given in evidence, notice in writing under the general issue, on a sheet of treble *rd.* stamped paper, must be delivered to plaintiff's attorney; and the person that delivers it must keep another copy of it by him on treble *rd.* stamped paper, to prove at the sittings or assizes, as the case is.

NOTES.

Plaintiff's original demand was 15*l.* 3*s.* 9*d.* Defendant gave notice to set off, but took no advantage under it, proving on the trial payments in part, which reduced the debt to 1*l.* 13*s.* 9*d.* and that sum the jury gave plaintiff in damages. Rule to shew cause, why defendant should not have leave to enter a suggestion on the roll, pursuant to the *stat.*
1 *W. & M.*

setting up courts of conscience in *Bristol* and *Gloucester*, and the debt recovered under 40*s.* *Pitts v. Carpenter* was quoted, where, after the benefit of a set off, whereby plaintiff's demand was reduced from 4*l.* 15*s.* 3*d.* to 1*l.* 13*s.* 3*d.* *B. R.* denied leave to defendant to enter suggestion. And court of *C. P.* were of the same opinion, saying, the demand in the case quoted was reduced by the defendant's act, it was not known to plaintiff at the time of bringing his action, whether defendant would take advantage of a set off or not. The inferior court has no jurisdiction for a debt above 40*s.* But this case differs from that quoted here. *No set off is used*, but payment proved under the *non assumpsit*. The original debt, which was the cause of action, appears to be no more than 1*l.* 13*s.* 9*d.* defendant submitting to the jurisdiction of this court doth not take away his remedy.

1. On a trial at *Guildhall*, the plaintiff proved 4*l.* 15*s.* 3*d.* to be due to him. The defendant, by a set off, discharged 3*l.* 2*s.* so the verdict was only for 1*l.* 13*s.* 3*d.* The defendant upon this moved on 3 *Jac.* 1. *c.* 15, and suggested both to be citizens of *London*, and prayed to be excused and have costs, and relied on the case of *Hickman and Colley*. But the court held, he was not intitled to the benefit of that act, though the damages were under 40*s.* for it is plain the real demand was above 40*s.* and how could the plaintiff tell, whether the defendant would set off any thing in that action, so as to be bound to chuse that jurisdiction. Besides, he has in effect recovered 4*l.* 15*s.* 3*d.* because a debt, which he must otherwise have paid, is satisfied. Here are two causes determined, both of them of greater value than is within the inferior jurisdiction. The plaintiff had judgment for the 1*l.* 13*s.* 3*d.* and his costs. *T. 16 G. 2. Pitts v. Carpenter.* 2 *Sir.* 1191. *Vide Brumpton v. Crabb, p. 30.*

The

remedy. After verdict he now comes *primo instante*. The suggestion may be traversed as to the inhabitancy. The London court of conscience act, 3 Jac. 1. c. 15. is a good statute; and though this act, relating to *Bristol* and *Gloucester*, be inaccurately penned after a good precedent, yet the court is bound by it. T. 18 & 19 G. 2. *Beusen v. Hemming*, in C. P. 2 Barnes's Notes 282.

2. The statute of limitations may be replied to a plea of a set off. T. 21 G. 2. *Remington v. Stevens*. Str. 1271.

3. The Defendant pleaded the general issue, but forgot to give notice at the same time of a set off; and, upon motion in time, the court gave leave to withdraw the plea, in order to deliver the same plea again, with a proper notice to set off; and said it had been done so before. E. 20 G. 2. *Blackbourn v. Matthias*, Str. 1267.

Impar lance.

Formerly the defendant had in all cases an impar lance to the term next after the return of the process, except the pro-

WHERE the writ is returnable the first or second return of any term, if the declaration be not *delivered* or *filed*, and also notice of *filing* given, before the last four days (exclusive) of the term the writ is returnable in, defendant is intitled to an impar lance of course. See *antea*, p. 79.

proceedings were by original, or for or against attornies or other privileged persons, or against prisoners in the custody of the marshal; in which cases the defendant was bound to plead, without any impar lance, the same term the declaration was delivered (if delivered four days before the end of the term); and, except the proceedings were by *habeas corpus*, or process was returnable the first return of *Easter* or *Michaelmas* term, and declaration delivered according to the rule of *Mich. 5 Ann.* But now the practice is altered, and the defendant must plead according to rule *Trin. 5 & 6 G. 2.* (a) if the process be returnable the first or second return of any term.

(a) See p. 79.

If the writ be returnable on any other return than the first or second, defendant is intitled to an impar lance of course; and notice ought to be for defendant to plead within the first four days of next term. See p. 80.

Where the writ is returnable on first or second return, (declaration not being delivered before the last four days of the term as above-mentioned), or any other return in one term, if the declaration be delivered any time before the effoin day of the next term, defendant must plead in four days in such next term (and notice must be accordingly), let the declaration be laid in any county, or defendant live where he will.

But if a writ be returnable in one term, and declaration is not delivered *before* the effoin day of

of the second term, the defendant is not obliged to plead in the second term.

No *special* imparlance to be allowed without leave of the court. *Rule E. 5 Ann.*

Replication, rejoinder (a), surrejoinder, rebutter, and surrebutter. (a) See p. 126, note 6.

TO compel the party to reply, &c. get a four days rule from the *master*, which you enter with the clerk of the rules, and serve on plaintiff's attorney. Pay the clerk of the rules 1s. 10d. and if the party does not reply, &c. in time, demand being made, sign *non pros.*

On all special rules given by the master, as to reply, rejoin, surrejoin, rebut, plead in bar, join in demurrer, enter the issue or demurrer on the part of the defendant, the party who is to do the act is to be served with a copy of the rule, and hath *four days exclusive*, after service of a copy of the rule, to reply, rejoin, &c. And if judgment be signed, or other proceedings had within that time, the same will be set aside.—But if a cause hath continued four terms without prosecution before issue joined, each party shall have a whole term's notice to reply, rejoin, &c. unless the cause hath been stayed by *injunction* or *privilege*.

Note; the rule to reply, &c. is given by the master on the back of the pleadings, and marked as entered by the clerk of the rules; and then you serve a copy thereof, adding the term, &c. thus:

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Michaelmas term, in the year of the reign of king George the second.

A. To reply, &c. [Here copy the rule,
against } as given by the master, on the back
B. } of the pleadings.
Ent'.

Rule to reply, rejoin, &c. may be given at any time in term, or within days after the end of every term.

N O T E.

Defendant moved, upon the act for the amendment of the law, for leave to *rejoin double*; but *Cur'* held, that it only extended to the case of *pleading at first*. T. 5 G. 2. *Warren and Ivis. Str.* 908.

(a) Attornies may make

Paper book (a),

up the *issue* and *demurrer books* in the following cases; viz. every issue that may be given on the book side; not guilty to a new assignment; the bar of *son frank tenement*; *comperuit ad diem* to a sheriff's bond; *nul tiel record* to a *sci. fa.* or action of debt on a judgment; a general demurrer to a declaration. In covenant, where the defendant in his bar concludeth to the country; every *special non est factum*; every *son assault demesne*; and all issues and demurrers upon every writ of error, *scire facias*, and *audita querela*; and all replenders or other things formerly entered of record. In all other cases, both by *bill* and *original*, the special pleadings are to be left with the clerks of the papers, who make copies thereof; and when issue is joined, the paper books are made up by them.

(b) If plaintiff's name begin with A. to be left with Mr. Benton, if with B. to be left with Mr. New, and so alternately.

carries

carries a copy of declaration, wrote on unstamped paper, to clerk of the papers, and he makes up the paper book, and gives a rule for defendant to receive the book, and returns it to be inrolled in four days. (Pay clerk of the papers 8*d.* *per* sheet for the whole book, and 4*d.* *per* sheet for all pleadings subsequent to the declaration, besides stamps). Deliver paper book to defendant's attorney, with notice of trial on the back; and, if he does not return it according to the rule, sign judgment, and execute inquiry; but if he return it in time, and pay you 8*d.* *per* sheet for the pleadings on his part; *viz.* *plea*, rejoinder, &c. and 4*d.* *per* sheet for the plaintiff's entries; *viz.* the *replication*, &c. and also for declaration, if not before paid for, you proceed to trial; but if defendant's attorney will not proceed to trial, but demurs to plaintiff's replication, he first scratches out at the bottom of the replication his joining issue, and leaves a demurrer in the office, and returns the paper book to plaintiff's attorney, with notice thereon that he has left a demurrer in the office; whereupon plaintiff's attorney carries the paper book to the clerk of the papers, who will add the demurrer and joinder in demurrer. You deliver the book again to defendant's attorney, which he must return in a *day* (a); and pay for the entries as before mentioned. If he return the book in time, and pays for it, you make an *incipitur* on a roll, and enter the proceedings with Mr. Child; then

(a) Note; defendant's attorney may, upon his returning the book with a joinder in demurrer, scratch out the demurrer and joinder, and give plaintiff's attorney the book with the *general* issue; but plaintiff may, to prevent this delay upon defendant's plea coming in, move, that defendant may plead *instante* a plea to stand to, and not waive. Draw upon the rule and serve it. See p. 127, note 11.

enter

enter all the paper book on a roll, get a number, docket your entries with Mr. Child, and carry in your roll, and give instructions to counsel, and he will move for a *consilium*, that is, a day for arguing the demurrer; and the clerk of the papers will mark in the margin of the record, *read* (a), drawn up the rule for a *consilium*, but you do not serve it (b). Enter the cause with the clerk of the papers, and make copies of the paper book for the judges (no stamp). You pay each of their clerks 2s. Plaintiff's attorney delivers the books to the chief justice, and the senior judge, and defendant's attorney to the other judges; and if defendant's attorney does not deliver his books two days before the argument, plaintiff's attorney does it for him, (c) and then defendant cannot be heard (d). — Where judgment goes for plaintiff, draw up your rule for judgment (you do not serve it); and if the action is in case, trespass, &c. wherein the damages are uncertain, give notice of executing a writ of inquiry. If judgment goes for plaintiff before the expiration of the notice for trial, you may execute your writ of inquiry the same day on which notice was given for trial on the paper book, by rule H. 8 G. 1. But if the judgment is in debt, you give no notice of executing a writ of inquiry, but you stamp either the rule for judgment, or the paper book, with a double half crown stamp, tax costs, get the master to mark the roll, and take out execution, &c.

(a) Give Mr. Phillips notice, and he will bring the record into court to be marked.

(b) So determined per Cur'. M. 19 G. 2. Str. 1242.

(c) The party who does not deliver books two days before the argument shall not be heard.

(d) If one party neglect, it shall be done at his costs by the other before any argument.

Rule M. 17 Car. 1.

Demurrer.

Demurrer.

Demurrer to the declaration.] If there is good cause of demurrer, the plaintiff's attorney should take out a summons to amend, on payment of costs; but if there is not good cause, he may, if general, make up the paper book himself, and add a joinder in demurrer, and deliver a copy to the attorney on the other side. Charge for copy of general demurrer book 4*d.* per sheet, and duty; and if not paid for, sign judgment.

T. 12 W. 3. — But, if *special* (a), the clerk of the papers makes up the paper book.

(a) Must be signed by counsel.

How to make up the paper book on a special demurrer.] Deliver a copy of the declaration to the clerk of the papers, who makes up the paper book, and gives a four days rule in the margin for defendant to receive and return the book, otherwise judgment. If defendant's attorney returns the book in time, and pays for it, you enter your proceedings with Mr. Child, &c. [Here observe the directions given concerning demurrer, p. 121, 122.]

If there is an issue as to part, and a demurrer as to the other part, you give notice of trial, and proceed to try your cause, and argue your demurrer too, if needful, in manner as is before directed.

If the plaintiff refuses to join in demurrer, you get a rule from the master, enter it with the clerk of the rules, and serve it; and if he does not join in demurrer before the rule is out, you may sign a *non pros.*

On

The present Practice of the

On delivery of the paper book of demurrer to the defendant's attorney, you cannot give notice of executing a writ of inquiry, but you must stay till after you have obtained judgment.

Defendant's attorney may, at the expiration of the time for returning the paper book, waive his demurrer, and give the general issue, and notice of trial must be given, but from the time of pleading the general issue.

Where the paper book is made up by defendant's attorney.] If plaintiff demurs in law, or takes issue on defendant's *plea, rejoinder, or rebutter*, and defendant in case of a demurrer joins therein, and plaintiff will not make up the book, and enter it on record, defendant may make up the book, and enter it on a rule given by the secondary for entering of such demurrer. See *Rule Easter 11 W. 3.*

When defendant has made up the book, he must deliver it to plaintiff's attorney, and pay him for the entry of his the defendant's pleadings, because plaintiff may enter the issue at any time before the expiration of the above rule given by the secondary, which rule ought to be served on the plaintiff at the same time the book is delivered to him. If the plaintiff does not enter the issue, the defendant may at the expiration of the rule, and give notice of trial by *proviso*; but then plaintiff ought to return to defendant's attorney the money he received from him for the entry on his part.

NOTES relating to *special pleas and demurrers.*

1. If a paper book be made up and delivered in term time, or within four days *exclusive* after term, with a rule given thereon by the clerk of the papers for bringing the same book to be inrolled, and defendant's attorney doth not, within four days after the delivery thereof, return the book, and join with the plaintiff in the special issue or demurrer made up, or *waive* his special plea, and give the *general* issue or *demurrer* to any *special* issue tendered, and pay for entering the pleadings on his part; judgment may be signed as if no plea had been pleaded.

2. But where a plea is not put in time, so that a paper book may be made and delivered in term, or within four days after, yet if it be made up and delivered within *eight* days after the term, defendant's attorney must take it, and return it again in four days after the delivery, or judgment may be signed.

3. If a plea be pleaded in term, or in time after the term, and the paper book is not made up and delivered within eight days *exclusive* after the term, if it be an issue to be tried in *London* or *Middlesex*, or a demurrer, the other party need not deliver back the book till within the first four days of the next term; but if it be an issue to be tried at the assizes, defendant's attorney shall deliver it back within four days after the delivery, and pay for entering his part, and join in the *special* issue, or give the *general* issue, and take notice of trial, or plaintiff's attorney may sign judgment by default, as if defendant had not pleaded. But in all cases, if plaintiff's

plaintiff's attorney accept the book after the four days, he cannot sign judgment.

5. If the paper book be of an issue in *fact*, the *four* days for keeping the books are accounted *exclusive*, if of a *demurrer* on an *issue in law*, the four days are *inclusive*.

6. In all special pleadings where plaintiff takes issue upon defendant's pleading, or traverses the same, or demurreth, so as the defendant is not let in to allege any new matter, there plaintiff may make up the paper book without giving a rule with the master to rejoin.

6. Clerk of the papers to receive no *special* plea or demurrer, unless signed by counsel. —

(a) So must the attorneys in the books for the judges.

And in the copies of pleas and paper books to set down the counsels names (a). *E. 18 Car. 2.*

(b) *Vide* notice of trial, p.

7. Upon delivery of any paper book, wherein an issue is joined, and notice of trial given on the back of the book (b), if the same be afterwards waived, and the general issue given, the notice which was given for the trial of the special issue shall serve for notice of the general issue.

8. Where plaintiff, upon any pleading of the defendant, tenders an issue, and the book is made up and delivered, with notice of trial, and defendant strikes out the *similiter*, and returns the book with a *demurrer*, if judgment be given for the plaintiff on the demurrer, the same notice, which was given for the trial of the issue on the paper book, shall serve for executing the writ of inquiry. *H. 8 G. 1.* But then plaintiff ought to give notice of the hour and place of executing the inquiry.

9. The

9. The plea of *non assumpsit* and the statute of limitations must be left with the clerk of the papers.

10. *General* demurrer cannot be waived, *special* demurrer may.

11. In case of a frivolous demurrer, *Cur* will order defendant to stand by it, or plead *de novo* on the morrow, or instantly.

12. Defendant when bound to plead an issuable plea, may demur to the replication.

13. All *special* causes, set down by the clerk of the papers to be argued (a), are to be entered at least *four* days *exclusive* of the day of argument, of which notice is *forthwith* to be given to the *attorney* or *agent* on the other side; and all such causes are to be argued in the order they stand entered, and are not to be adjourned by consent or otherwise, unless the court shall for reasonable cause, verified by affidavit, upon application to be made by either of the parties, their attorney or agent (at least *two* days before the day of argument), otherwise order. And all such causes, remaining undetermined at the end of any term, shall, without any new entry, be continued in the book kept by the clerk of the papers, to come on the next term in the order they stand. *Mich.* 1756.

(a) On setting down a cause to be argued, the term and number of the roll ought to be inserted. See *Andrews*

14. By the *Stat.* 4 & 5 *Ann.* c. 16. it is enacted, "that where any demurrer shall be joined and entered in any action or suit, in any court of record, the judges shall proceed and give judgment according as the very right of the cause, and matter in law, shall appear unto them, without regarding any imperfection, omission, or defect, in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever ;

31.

“ soever; except those only; which the party
 “ demurring shall *pecially* and *particularly* set
 “ down and express, together with his demur-
 “ rer, as causes of the same; notwithstanding
 “ that such imperfection, omission, or defect,
 “ might heretofore been taken to be matter of
 “ substance, and not aided by the statute 27 El.
 “ cap. 5. intituled, *An act for the furtherance of*
 “ *justice in case of demurrer and pleadings*; so as
 “ sufficient matter appear in the said pleadings,
 “ upon which the court may give judgment,
 “ according to the very right of the cause; and
 “ therefore no advantage or exception shall be
 “ taken of or for an immaterial traverse, or of
 “ or for the default of entering pledges upon
 “ any bill or declaration, or of or for the de-
 “ fault of alleging the bringing into court any
 “ bond, bill, indenture, or other deed what-
 “ soever, mentioned in the declaration or other
 “ pleading; or of or for the alleging the bring-
 “ ing into court letters testamentary, or letters
 “ of administration; or of or for the omission
 “ of *vi & armis & contra pacem*, or either of
 “ them; or of or for want of averment of *hoc*
 “ *paratus est verificare*, or *hoc paratus est veri-*
 “ *ficare per recordum*, or of or for not alleging
 “ *prout patet per recordum*; but the court shall
 “ give judgment according to the very right of
 “ the cause aforesaid, without regarding any
 “ such imperfections, omissions, and defects, or
 “ any other matter of the like nature, except
 “ the same shall be specially and particularly
 “ set down, and shewn for cause of demurrer.”

Note; that though the want of form is not
 sufficient upon a *general* demurrer, yet it being
 made a cause of demurrer, may prevail; for
 the judge is to have no regard to want of form,
 but

but only to such causes as the party demurring shall set down; and if there be want of substance, a general demurrer will suffice, without shewing cause: *Sed quære. Vide Instr. Cl. p. 1. page 289.*

15. *If one named in the indenture does not seal, Demurrer: be must be excluded by averment.* Ten plaintiffs bring covenant on articles of partnership; and on oyer it appeared, there were two others named in the deed, which at the close of it runs in the usual form, *in witness whereof all the parties have set their hands and seals.* Defendant demurs; and on argument insisted, that the oyer is part of the declaration, and it is as bad as if the plaintiff had shewn, that the covenant was with two others, and it could not be split into several actions. *Et per Cur'*; if the other two did not seal the deed, the plaintiff might have helped it by averment; but here on the oyer we must take it they did seal. Besides, as they are named in the covenant as *covenantees*, they might join in the action, though they did not seal; this the defendant may take advantage of on oyer and demurrer; and therefore judgment must be for the defendant. *M. 14 G. 2. Vernon et al' v. Jefferys. Str. 1146.*

Demurrer to a declaration.

AND the said *A.* by ——— his attorney, comes and defends the force and injury, when, &c. and saith, that the said declaration, and the matter therein contained, are not sufficient in law to maintain the said action against the said *A.* to which said declaration the said *A.* hath no need, nor is he obliged by the law of

the land to answer. Wherefore, for want of a sufficient declaration in this case, the said *A.* prays judgment, and that the said declaration may be quashed; and the said *A.* according to the statute, shews the causes of demurrer following; to wit, that it does not appear, nor is it alleged in the said declaration, whether the said *G. H.* died intestate or not; nor is it alleged in the said declaration, as it ought to be, that administration of the goods and chattels, which were of the said *G. H.* at the time of his death, was committed to the said *B.* and also that the said declaration is uncertain, and wants form.

Demurrer in bar to a declaration.

AND the said *A. B.* by *J. G.* his attorney, comes and defends the force and injury, when, &c. and says, that the said declaration, and the matter therein contained, are not sufficient in law for the said *J. B.* to have and maintain his said action against the said *A.* to which said declaration the said *A.* has no need, nor is he bound by the law of the land in any manner to answer; and this he is ready to verify; wherefore, for want of a sufficient declaration in this case, the said *A.* prays judgment, and that the said *B.* may be barred from having his said action against him, &c. and for cause of demurrer in law, the said *A. B.* according to the form of the statute, &c. shews here to the court the following causes, to wit, that the said two several causes of action, to wit, of trespass, and of trespass upon the case, in the said declaration above contained, and above shewn, do not

not lie together, nor ought to be contained in one and the same declaration; and that in the said declaration there are divers empty spaces, wanting words to signify and expresse days, months, year, and other things.

And upon this the said *A.* prays, that the said *B.* may join with him in demurrer; and thereupon a day is given by the court of our lord the king now here, for the said *B.* to be before our lord the king at *Westminster*, until — next after — next ensuing, to join with the said *A.* in the said demurrer in law; and the said *B.* at that day solemnly required came not, nor did he farther prosecute his said bill against the said *A.* but made default. It is therefore considered, that the said *B.* take nothing by his said bill, but that he and his pledges of prosecuting, to wit, *John Doe* and *Richard Roe*, be thereupon in mercy, and that the said *A.* go thereupon without day, &c. And it is further considered by the court of our lord the king now here, that the said *A.* do recover against the said *B.* — *l.* for his costs and charges, by him about his defence in this behalf sustained, adjudged to the said *A.* by the court of our lord the king, according to the form of the statute in such case lately made and provided, &c. and that the said *A.* having thereof execution, &c.

Day given to plaintiff to join in demurrer, who made default, and was ~~not~~ *prossed.*

Joinder in demurrer to a plea in bar.

AND the said *J.* says, that the plea by him the said *J.* in manner and form above pleaded, and the matter therein contained, is good and sufficient in law to bar the said *A.* from having his said action against him the said *J.*

Continuance
by Cur' advi-
sara vult.

which said plea, and the matter therein contained, the said *Joseph* is ready to verify and prove, as the court, &c. And because the said *A.* has not answered the said plea, nor hitherto any ways denied it, the said *J.* prays judgment, and that the said *A.* may be barred from having his said action against him the said *J.* &c. But because the court of our said lord the king now here, is not yet advised what judgment to give of and concerning the premisses, a day is given to the said parties, that they be before the lord the king at *Westminster*, on — next after —, to hear their judgment thereon, because the said court of our lord the king now here, is not yet advised thereof.

Issue [general.]

Salk. 4. pl.
11.

Of making up and delivering general issue.] When general issue is joined, make it up. Copy it on treble 1 d. stamped paper, deliver the copy to the defendant's attorney, charge on the back 4 d. per sheet (72 words make a sheet) besides duty; entering plea 1 s. and if declaration be not paid for before, charge for it also. If defendant's attorney refuses to pay for the issue on tendering the same (a), or, if left for him, it is not paid for within 24 hours, you may sign judgment.

(a) *Vide Rule*
T. 12 W. 3.

If plaintiff is
streightened in
time, he may
have a judge's
summons for
further time.

Rule to enter the issue.] If plaintiff's attorney delays to enter the issue, get a rule from the master on the back of the issue, which enter with the clerk of the rules, and serve plaintiff's attorney with a copy, and he must, before the rule is out, enter the issue, or you may sign a *non profs* for want thereof.

If

If the action be laid in *London* or *Middlesex*, Plaintiff must defendant ought not to give a rule to enter the issue the same term issue is joined, unless notice of trial hath been given; — and in a country cause plaintiff is not bound to enter his issue the same term.

enter the issue, and bring in the record, within four days after notice of the rule, in

London or *Middlesex*; in a country cause, before the continuance day of that term, or a *non pros* may be signed.

N O T E S.

1. Plaintiff's attorney sent the issue to defendant's attorney, who received and paid for it; but plaintiff not going on to trial, defendant gave him a rule to enter his issue, in order to carry down the cause by proviso. And, upon an affidavit that plaintiff's attorney had mislaid the papers, the court ordered defendant's attorney to give him a copy of the issue, the better to enable him to comply with the rule. *Hil. 7 G. 1. Wiar v. Smith. Str. 414.*

2. Upon looking into the record, there was no issue joined, for it was *et præd'*, the defendant instead of the plaintiff, *similiter*: therefore objected, that the *Cb. J.* had no commission to try any issue, and the doubt was, what to do, for the jury had been sworn. And upon advising with the bar, the *Cb. J.* dismissed the jury; for he could not call the plaintiff (a), or suffer the defendant to take a verdict. *T. 12 G. 2. in Middlesex. Str. 1117.*

(a) None but the defendant can call the plaintiff. *Str. 267.*

3. Note; There can be no issue offered that is contrary to the record. *Str. 734.*

How to enter
issues on the
roll. *Vide p.*

How to make up an issue, where the declaration and plea are of the same term.

Of *Michaelmas* term, in the _____ year of
the reign of *George* the second, now king
of *Great Britain*, &c.

London, **B**E it remembered, that on
to wit, **B** next after the morrow of *All Souls*,
(a) The first (a) in this same term, before our lord the king
day of the at *Westminster*, came *A. B.* by his at-
term. torney, and brought into the court of our said
lord the king then there, his certain bill against
C. D. being in the custody of the marshal of the
Marshalsea of our said lord the king, before the
king himself, of a plea of trespass upon the
(b) Trespass case (b), and there are pledges of prosecution,
and assault, or to wit, *John Doe* and *Richard Roe*, which said
debt, as the bill follows in these words, to wit, *London* to
action is. wit, *A. B.* complains of *C. D.* being in the
custody of the marshal, &c. [Here set forth
the declaration *in hæc verba*, leaving out the
pledges to prosecute, they being inserted above.]

Then on a new line enter the defendant's
plea thus :

And the said *C. D.* by his attorney,
comes and defends the force and injury, when,
&c. and says [Here insert the plea] ; and of this
he puts himself upon the country ; and the
said *A. B.* does the like. Therefore let a jury
come thereupon before our lord the king at
Westminster, on next (c), &c. who are
(c) Some day (c) in no-wise a-kin either to the said *A. B.* or to
in the term the said *C. D.* to take cognizance, upon their
the issue is of, the said *C. D.* to take cognizance, upon their
and before the oaths, of the whole truth of the premisses, be-
trial. cause

cause as well the said *C. D.* as the said *A. B.* have put themselves upon that jury. The same day is given to the parties aforesaid, at the same place.

How to make up an issue of Mich. term from a declaration of another term.

Of Michaelmas, &c.

Middlesex, **B**E it remembered, that in the term to wit, **B** of the *Holy Trinity* (a) last past, (a) The term before our lord the king at *Westminster*, came the declaration is of. *A. B.* by his attorney, and brought into the court, &c. [as in the other]; and thereupon he brings suit, &c.

Then on a new line the imparlance.

And now at this day, to wit, on — next after the morrow of *All Souls* (b), in this same (b) The first term, to which day the said *C. D.* had licence day of the to imparle to the said bill, and then to answer, term the issue is of. &c. before our lord the king at *Westminster*, comes as well *A. B.* by his attorney aforesaid, as the said *C. D.* by his attorney; and the said *C. D.* defends the force and injury, when, &c. [Here insert the plea.] And of this he puts himself upon the country; and the said *A. B.* does the like. Therefore, &c. as before.

If the declaration be of above four terms standing, you say:

Of, &c.

Middlesex, **B**E it remembered, that heretofore, Note: if the to wit, **B** that is to say, of the term of plea be of in the year of the reign of two or three our sovereign lord *George* the second, now king terms subsequent to the K. 4 of ne eclar.

tion, you enter but one imparlance.

of *Great Britain, &c.* came *A. B.* by his attorney, *&c.* with an imparlance, as before.

Where there are two or more issues upon a pleading, then after the tender of the last issue; And of this he puts himself upon the country, and the said *C.* doth so likewise; you add, Therefore as well to try this issue, as the other issue [or issues] above joined between the parties, let the jurors come before our lord the king at *Westminster*, on next after who are in no-wise of kin either to the said *A. B.* or to the said *C. D.* to make a certain jury of the country between the said parties of the plea aforesaid, to recognize, upon their oaths, the full truth of and concerning the premises, because as well the said *C. D.* as the said *A. B.* between whom the matter in variance is, have put themselves upon that jury. The same day is given to the parties aforesaid at the same place.

(a) Notices of trial to be in writing.

Notice of trial (a).

Sittings in London and Middlesex.] If defendant lives within 40 miles from London, eight days notice of trial must be given, exclusive of the day it is given; if defendant lives above 40 miles, then fourteen days exclusive, &c.

The *stat. 14 G. 2. c. 17. s. 4.* says, ten days at least where defendant resides above 40 miles from London; but this *stat.* does not alter the practice, which is to give 14 days notice, where defendant lives above 40 miles from London, and the cause is to be tried at the sittings in London or Middlesex.

Notice of trial is commonly given on the back of the issue.

NOTES.

NOTES.

1. On notices of trial, the distance from *London* is taken by the *computed*, and not post miles, for the rule (as to these notices) was antienter than the post miles, and consequently respected the *computation* before the erection of post miles. *M. 7 G. 2. Bates v. Pettipher. Str. 954. Ofgood v. Delany. M. 18 G. 2. Ibid.*

2. *Note*; for putting off trials for want of witnesses, it is necessary to swear, that the party is advised and believes the persons absent are material witnesses, and that he cannot safely proceed to trial without their evidence. *M. 4 G. 2. Anon. M. S. Rep.*

At the assizes.] Ten days at least. *Stat. 14 G. 2. c. 17. s. 4.*

On the back of the issue was wrote, "take notice of trial at the next assizes." And tho' there was *no date* or *county*, or attorney's *name* mentioned, yet, being on the back of the issue, the court held it good; but it would not be so upon a separate paper. *M. 19 G. 2. Henbury v. Rose. Str. 1237.*

On an old issue.] If a cause has continued four terms without prosecution after issue joined, there must be a term's notice of trial, such notice to be given before (a) the effoin day of the fifth, or other subsequent term. Judge's summons, if no order made, is no proceeding; but a notice of trial, though countermanded, is.

(a) *Vide p. 138, note 2.*

NOTES.

NOTES.

1. *Per Cur'*; if on an old issue notice of trial be given before the first day in full term, it is sufficient; and it need not be given before the effoin day. *M. 6 G. 2. Harvey v. Porter. Str. 211. Vide next case.*

2. It was settled (on consideration), that when a term's notice of trial is required upon an old issue, the notice must be given before the effoin day, and that is a full term. *E. 15 G. 2. Bogg v. Rose. Str. 1164.*

3. The court, on motion for a new trial, held, that the giving notice of trial, at the end of half a year after issue joined, would prevent the necessity of giving a term's notice, till a year after the last notice, which was given and countermanded. *M. 9 G. 1. Green v. Guantlett. Str. 531.*

New notice of trial.] If notice be given, and cause not tried, but plaintiff defers it longer than one term after, then a term's notice must be given. But if he tries it next term after, there is no need of new notice.

(a) Notice to be given before rising of the court.

If defendant enters a *ne recipiatur* in London or Middlesex, and thereby hinders plaintiff from trying his cause the sittings the notice was given for, plaintiff may try it the next sitting, upon giving notice (a) during the first sitting, *i. e.* the sitting the cause would have been tried, if no *ne recipiatur* had been entered. See *Rule M. 4 Ann.*—But if the cause be not tried at such next sitting, then new notice must be given as at first, unless cause be made a *remanet*.

If notice of trial be given for a day certain in *London* or *Middlesex*, and plaintiff is not ready on that day to proceed to trial, he may try the cause the next sitting upon the like notice, as when a *ne recipiatur* is entered by defendant as before mentioned. But if cause be not tried at such next sitting, then new notice must be given as at first, unless the cause be made a *remanet*.

If a cause is made a *remanet*, then new notice of trial is never given, for defendant is bound to attend till the cause be tried.

Countermand of notice of trial (a).

(a) Countermand to be in writing.

COUNTERMAND to be delivered at least six days before the intended trial. *Stat. 14 G. 2. c. 17.*— Unless at the sittings, and defendant lives *within* 40 miles of *London*; in which case two days before the trial (*exclusive* of the day countermand is delivered), is sufficient.

N O T E S.

1. If plaintiff does not proceed to trial, or countermand in time, defendant, on affidavit of attendance and necessary expences, shall have his costs taxed. *M. 1654. sect. 18.* But altho' plaintiff does not proceed to trial, whereby costs are taxed for defendant, and afterwards new notice, yet *Cur'* will not stay the trial for not paying these costs (except in ejectment), because defendant hath another remedy to recover them.

2. *Per*

Motion on the authority of *Moaks v. Watts*, that the plaintiff, who was a pauper, might be restrained from going on

to trial till he paid costs for former notices. But the court thought that case did not put it on a right foot; and that it was absurd to make any rule about costs, whilst the admission stood; and therefore ordered plaintiff to shew cause, why he should not be dispaupered. And, on affidavit of service, made it absolute. *T. 7 G. 2. Taylor v. Lowe. Str. 983.*

N. B. That these cases of *Whitlock v. Humphreys*, *Frogmorton and Norcliffe*, *Mendapace v. Humphreys*, and *Green v. Giffard*, were all before the *stat. 14 G. 2.* §. 17.

2. *Per Curiam*; it is settled in *C. B.* and we rule it so here, that a pauper shall not pay costs for not going on to trial, as other plaintiffs do. But if the costs are taxed, we will prevent his being vexatious, by obliging him to pay them before he shall try the cause. *E. 7 G. 1. Moaks v. Watts. Str. 420,*

3. Upon debate it was settled, that, to save costs for not going on to trial, it would be sufficient to countermand notice in a town-cause two days, and in a country-cause four, before the assizes; and that it should be a general rule, without considering the charges or inconveniencies in any particular case. *M. 3 G. 2. Whitlock v. Humphreys. Str. 849.* — N. B. Both are not to be inclusive, for *M. 6 G. 2. Frogmorton and Norcliffe*, the countermand was 16, and the assizes 19; and held, that costs should be paid. *Ibid.*

4. The assizes at *Winton* was on *Wednesday*, and on *Monday* night before, the notice of trial was countermanded to the agent in *London*; and *Cur'* held, it did not save costs; and that, being given in town, it should be four days, if to the attorney in the country, two days would be sufficient. *E. 10 G. 2. Mendapace v. Humphreys. Str. 1073.*

5. The cause was tried upon a day to which it was continued by a second countermand. Defendant making no defence, the verdict was set aside, it being only in the plaintiff's power to continue

continue his notice *once* in a term. And *Page* J. said, it was so settled in C. J. *Holt's* time, on examining the attornies. *M. 13 G. 2. Green v. Giffard. Str. 1119.*

Trials at bar.

1. If plaintiff or defendant would have a special jury, the court must be moved, and a rule will be made, for the sheriff to attend the master with the freeholders book, at the expence of the party that moves (a); and the master, in the presence of the attornies of both parties (b), shall name thereout 48 of the freeholders, of whom 12 shall be struck out on each side, and the remaining 24 shall be returned by the sheriff. (*Vide T. 8 W. 3.*) This rule must be served on the attorney of the other side, and on the under sheriff or deputy. The party that moves for special jury may at the same time move for a view (if necessary), and one rule will do for both. In that part of the rule which is for a view, the court orders, that there issue a *distingas* directed to the sheriff, with a clause in the writ commanding the sheriff, that he cause six or more of the jury, returned and named in the writ, to take a view of the place in question before the day of trial, viz. such a day, and that by consent of the parties (if by consent; it may be directed by the rule, or by a judge's order); such a one on the part

(a) Formerly the master and under sheriff (who attends with the book of freeholders names), had each a guinea a side from the plaintiff and defendant; but since the *stat. 3 G. 2. c. 25.* the whole charge lies on the party applying for a special jury.

(b) On striking a special jury by the secondary for a trial at bar, the secondary, on behalf of the absent party, shall strike out twelve names, and the rest of the jurors shall be returned to try the issue. *T. 8 W. 3.*

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of the plaintiff, and such a one on the part of defendant, shew the place in question to the said six or more of the jury, who are to view the same; and the expences of the view to be equally borne by both parties, and no evidence on either side to be given at the time of taking the view.

2. The day of trial at bar must be appointed by the court, but plaintiff may countermand, and in such case it cannot be brought to trial, unless some day be appointed again by the court.

3. No trials at bar are ever allowed in an issuable term.

4. On trials at bar, each juror, lying out one night after a *privy* verdict delivered, to be allowed only 3*s.* 4*d.* for diet, besides the charges of his lodging. Two tipstiffs, and one crier or usher, 2*s.* *M.* 1654. *sect.* 19.

5. Upon consideration of the jury act, 3 *G.* 2. c. 25. *sect.* 16. *Cur'* held, that, if the verdict goes on that side which moved for the special jury, the extraordinary allowance to a special jury, and all the expences, except what attend the actual striking, should be taxed and allowed against the losing party. *M.* 11 *G.* 2. *Hamelton v. Style.* *Wilks v. Eames.* *Str.* 1080.

Vide 24 *G.*
c. 18.

6. Trials at bar are granted upon consideration of the consequences of a conviction upon an information. *M.* 3 *G.* 1. *Str.* 52. Trials at bar are grantable either upon the value of the lands, or difficulty of the title. *M.* 4 *G.* 2. *Haycroft v. Rose.* *M. S. Rep.*

7. Trial at bar grantable where the whole estate in demand is of small parcels, tho' against several defendants, who hold by different titles; for if plaintiff makes but one title to the whole, he

he has a right to join them all together. The lessor being a lord, and having privilege, it was moved, that he might name a good plaintiff to be liable to costs; but denied. *M. 8 G. 1. Preston v. Linen. Str. 479.*

8. No rule for trial at bar before issue joined, for it is below the dignity of the court to do it, till they know whether the issue joined will be a matter of difficulty or not. *Str. 696.*

9. No trial at bar in a cause arising in *London*, the citizens not being to be brought out of the city. *Str. 856.*

Trial by proviso.

1. If plaintiff does not go on to trial within the time he ought by the course of the court (*a*), (*a*) No trial defendant may get a rule on the issue from the master, which must be entered with the clerk of the rules (pay 1 s. 10 d.) for plaintiff to reply, and enter his issue, serve a copy on plaintiff's attorney, and he must, before the rule is out, enter the issue, and carry it and give the defendant's attorney the number thereof (*b*). The issue being entered, defendant may have a *venue* by proviso, and try the cause. If plaintiff does not enter his issue within the time allowed by the rule, you sign a *non pros*, and tax costs. But if plaintiff is streightened in time, he may take out a summons for further time.

can be had by proviso in London or Middlesex, till default be made by the plaintiff after the issue is entered on record; nor in country-causes, till plaintiff hath made default in trying his issue the next affizes after

the issue is entered; and in neither case till a rule for a trial by proviso be entered. (*b*) *Vide p. 132, 133.*

2. Defendant's attorney must give plaintiff's notice (*c*), that the cause will be tried such a time by proviso, and if defendant does not then

(*c*) For trial by proviso, defendant must give the

same notice as then try it, or countermand in time, plaintiff shall have costs.

3. Plaintiff may give notice, and try the cause, for defendant cannot do it, unless plaintiff neglects.

*Vide note 7.
this page.*

4. Defendant's attorney, before the trial, must get a rule, which is in these words, *Let there be made a record of nisi prius by proviso, if the plaintiff hath made default.*

5. Both plaintiff and defendant may carry down the record at the same time, but the trial shall be by the plaintiff's record, if he enters it with the marshal; but if he refuses or omits, defendant may proceed on his record.

6. *Cur'* made defendant pay costs for not going on to trial by proviso, according to notice. *E. 1 G. 2. Watkinson v. Poole. Str. 797.*

7. The cause was tried by proviso, and plaintiff nonsuited; but set aside for want of a rule being given in the office, the form of which is, *Let, &c. Vide note 4, this page.* And this was agreed to be the old practice, but generally discontinued. *Stile's and Lilly's reports* were cited. *M. 10 G. 2. Dodson v. Taylor. Str. 1055.*

Record of nisi prius.

INGROSS it on a double 2s. 6d. stamped press of parchment. The *issue*, or an *incipitur* thereof (a), must be entered on a roll. Carry the record, roll, and issue paper, to Mr. Child, pay him for entering issue not exceeding ten sheets, 3s. 6d. and 1s. for six more; then carry the record to Mr. Tully, who will examine, seal, and sign it; pay him 7s. 6d. for the first eight sheets, and 7s. for every eight sheets after, and generally 6d. to the sealer.

(a) *Viz.* warrants of attorney, and three or four lines of the issue.

Records of *nisi prius* in *London* and *Middlesex* may be sealed *on* or *before* the day of trial. See *Rule E. 7 G. 1.* But records of *nisi prius* for trial at the assizes, by rule 31 *Car. 2.* are not to be sealed after three weeks from the end of the term. But the practice is altered, for by a judge's order (pay Mr. Tully 2s.) you may have your record sealed at any time before the assizes; pay Mr. Tully 2s. — *Note*; if the record be on an old issue, you pay 2s. more.

Notice fixed up in the king's bench office.

THE court having observed, that the *rolls* and *records* are so badly wrote, that they ought not to be filed, the clerk of the dockets hath received orders for the future to pass no *rolls* or *records*, but such as are fairly wrote or *ingrossed*.

N O T E S.

1. Whilst the jury were swearing, defendant's counsel called for the record, and finding a mistake in it, said, they would make no defence. Plaintiff's counsel upon this, to avoid a nonsuit, and to save the costs, refused to pray a *tales*; and though twelve had been sworn, yet there having been no actual prayer of a *tales*, the cause was suffered to remain for want of jurors. T. 12 G. 1. *Jenkins v. Purcel*, at Guildhall, coram Raymond, Ch. J. 1 Str. 707.

2. If the record of *nisi prius* agrees with the declaration delivered, a variation from the issue is not material. Plaintiff declared on a bond dated 6 Jan. 1728. Defendant pleaded *non est factum*; and in the issue delivered, the bond was described as in 1738, and the issue was received and paid for without any objection. The record of *nisi prius* was 1728, and no defence being made, the court was now moved to set it aside, as varying from the issue delivered. But the court refused to set aside the verdict, for the defendant's plea upon record was not altered by it; the issue tried being, whether defendant executed a bond in 1728. Besides, he should have refused the issue if not agreeable to the declaration. E. 13 G. 2. *Shepley v. Marsh*. 2 Str. 1131.

3. Rule to make up a new record, the first being lost. Str. 141.

The nisi prius record begins thus :

*Pleas before our lord the king at Westminster of : Placita¹
the term of, &c. [same term with the issue,]
in the year of the reign of our sove-
reign lord George the second, now king of Great
Britain, &c.*

Roll.

BE it remembered (a), &c. immediately (a) Here en-
after the issue, on a new line, write, ter the whole
issue as deli-
vered. *Note ; you enter the contents of the venire, as on the plea roll.*

*Pleas, &c. of the term of, &c. [the term in ² Placita.
which the issue is to be tried,] in the
year of the reign of our sovereign lord George
the second.*

*Middlesex, to wit, the jury between A. B. Jurata.
plaintiff, by his attorney, and C. D. defendant,
of a plea of trespass upon the case [as the action
is,] is respited before our lord the king at West-
minster, to next, (b) &c. unless the defendant.
king's right trusty and well beloved
his majesty's chief justice, assigned to hold pleas (b) The re-
before the king himself, shall come on turn of the
[the day of trial,] at Westminsterball, in the distringas,
county of Middlesex aforesaid (c), according to which must be
the form of the statute in such case made and the next re-
provided, for default of the jurors, because turn day af-
none of them did appear. Therefore let the ter the day of
sheriff have the bodies of the said jurors, to trial.
(c) If the re-
cord is to be
tried in Lon-
don, say, at the Guildball of the city of London aforesaid.*

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make the said jury between the parties aforesaid, of the plea aforesaid, accordingly. The same day is given to the parties aforesaid, at the same place.

If the cause is to be tried at the assizes, then add to the jurata,

AND be it known, that the king's writ in this case on record was delivered to the deputy sheriff of the said county, on [the last day of the term] in this same term, before our lord the king at *Westminster*, to be executed, according to law, at his peril.

Record of nisi prius, postea, verdict, and judgment, &c. for plaintiff, in case the declaration being of a precedent term.

Pleas before our lord the king at Westminster, of term, in the year of the reign of our sovereign lord George the second, now king of Great Britain, &c.

Roll.

Cambridge, **M**Emorandum, that heretofore, to wit, in term, in the year of the reign of our sovereign lord George the second, now king of *Great Britain, &c.* before our lord the king at *Westminster*, came *A. B.* by ——— his attorney, and brought into the court of our said lord the king then there, his bill against *C. D.* gentleman, and *E.* his wife, in the custody of the marshal of the *Marshalsea* of our said lord the king, before the king

king himself, in a plea of trespass on the case; and here are pledges of prosecuting, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, *Cambridge*, to wit, *A. B.* gentleman, complains of *C. D.* gentleman, and *E.* his wife, in the custody of the marshal of the *Marshalsea* of our lord the king, before the king himself; for that, to wit, that whereas, &c. [Here set forth the whole declaration.]

And now at this day, to wit, *Friday*, in this Imparlance: same term, unto which day the said *C.* and *E.* had leave to imparl to the said bill, and then to answer, &c. before our lord the king at *Westminster*, came as well the said *A.* by his attorney aforesaid, as the said *C.* by *R. S.* their attorney; and the said *C.* and *E.* his wife, defend the force and injury, when, &c. and say, that they (a) (a) This was an action on the case against husband and wife, on promise of marriage by wife while sole; and on an *ind' ass'* for money laid out for, and lent her while sole.

did not undertake, in manner and form as the said *A.* above complains against them; and of this they put themselves upon their country; and the said *A.* likewise, &c. Therefore let a jury come thereupon, before our lord the king at *Westminster*, on *Wednesday* next, &c. and who are of no wife of kin either to the said *A.* or to the said *C.* and *E.* his wife, to take cognizance, upon their oaths, of the whole truth of the premises, because as well the said *C.* and *E.* as the said *A.* have put themselves upon that jury. The same day is given to the parties aforesaid, at the same place. Afterwards the process is thereupon continued between the parties aforesaid, of the plea aforesaid, by the jury between them being respited before our lord the king at *Westminster*, until *Monday* next, &c. then next following, unless the justices of our lord the king, assigned to hold the assizes in the county

L 3

aforesaid,

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aforesaid, shall first come on the day
of at the castle of *Cambridge*, in the
county aforesaid, according to the form of the
statute in such case made and provided for de-
fault of the jurors, because none of them did
appear. At which day, before our lord the
king at *Westminster*, the said *A.* comes by his
attorney aforesaid, and the said justices, before
whom the said issue was tried, sent hither their
said record had in these words. Afterwards at
the day and place within contained, before
knight, chief baron of the exchequer
of our lord the king, and gentleman,
for this turn associated to the said and
Sir knight, one of the justices of our
said lord the king, assigned to hold pleas before
the king himself, justice of our said lord the
king, assigned to hold the assizes in the said
county of *Cambridge*, by force of the statute, &c.
The presence of the said not being ex-
pected by virtue of the writ of our lord the
king of, &c. came the within named *A. B.* by
his attorney within named, and the within named
C. D. and *E.* his wife, although solemnly re-
quired, came not, but made default. There-
fore let the jurors of the jury within mentioned
be taken against them by default; upon which
the jurors of that jury, being summoned, also
came, who, to say the truth of the within con-
tents, being chosen, tried, and sworn, say, upon
their oaths, that the said *E.* undertook, in man-
ner and form as the said *A.* within complains
against the said *C.* and *E.* and assess the da-
mages of the said *A.* by occasion of the not
performing the promises and undertakings with-
in specified, over and above his costs and
charges,

Postea.

Verdict for
plaintiff.

charges, by him about his suit in this behalf expended, to pounds, and for those costs and charges to forty shillings; therefore it is considered, that the said *A. B.* recover against Judgment; the aforesaid *C. D.* and *E.* his wife, his damages aforesaid, by the said jury in form aforesaid assessed; and also pounds for his said costs and charges, by the court of our lord the king now here adjudged of increase to the said *A.* by his assent, which damages amount in the whole to pounds; and the said *C.* and *E.* in mercy, &c. Afterwards, to wit, *Satur-* Error in the Exchequer chamber, day, the day of in the year of the reign of our sovereign lord *George* the second, now king of *Great Britain*, &c. a transcript of the record and proceeding aforesaid, between the parties aforesaid of the plea aforesaid, with all things concerning the same, by pretext of a certain writ of our lord the king for correcting errors, prosecuted by the said *C.* and *E.* on the premisses, by the court of our lord the king here before the king himself, was transmitted before the justices of our said lord the king of the Common Bench, and barons of the Exchequer of our said lord the king, of the degree of the coif in the Exchequer chamber, according to the form of the statute made in the parliament of the lady *Elizabeth*, late queen of *England*, &c. held at *Westminster* on the 23d day of *November*, in the 27th year of her reign. And the said *C.* and *E.* appearing in Errors assigned. the Exchequer chamber, assigned certain matters for error in the said record and process, for reversing the said judgment; to which the said *A.* also appearing in the said court of Exchequer chamber, pleaded, that neither in the said record and process, nor in giving the said judgment, *In nullo est erratum* pleaded.

Judgment affirmed.

Remittance of the record, &c.

ment, was in any thing erroneous; and afterwards, to wit, on *Tuesday* the seven and twentieth day of *June*, in the year of the reign of our sovereign lord *George* the second, now king of *Great Britain, &c.* as well the record and proceedings aforesaid, and the judgment thereupon given, as also the causes aforesaid by the said *C.* and *E.* assigned and alleged for error, being by the said court of Exchequer chamber diligently examined and fully understood, it seemed to the said court of Exchequer chamber, that the said judgment was in no wise vicious or defective, and that the said record was not in any thing erroneous: Therefore it was then and there considered by the said court of Exchequer chamber, that the said judgment be in all things affirmed, and do stand in its full strength and effect (the said causes and matters assigned and alleged for errors by the said *C.* and *E.* in any thing notwithstanding); and it was further then and there considered by the said court, that the said *A.* recover against the said *C.* and *E.* ten pounds and ten shillings, by the court there adjudged to the said *A.* by his assent, according to the form of the statute in that case made and provided, for his damages, costs, and charges, which he hath sustained by occasion of the delay of the execution of the said judgment, by pretext of prosecuting the said writ of error; and thereupon the said record, and also the said proceedings of the said justices of the said Common Bench aforesaid, and the said barons of the said Exchequer, before them had in the premises by the said justices and barons, before our lord the king, wheresoever, &c. were then remitted, according

ing to the form of the statute, &c. and they now remain in the court of our said lord the king here, before the king himself, &c. Afterwards, to wit, *Wednesday* next after three weeks from the day of the *Holy Trinity*, in the year of the reign of our sovereign lord *George* the second, now king of *Great Britain*, &c. before our said lord the king at *Westminster*, came the said *A.* by his attorney aforesaid, and acknowledged, that he had been satisfied by the said *C.* and *E.* for the damages, costs, and charges, aforesaid; therefore let the said *C.* and *E.* be quit of the said damages, costs, and charges, &c. Satisfaction
acknowledged.

Mittimus to a county palatine.

GEORGE the second, &c. to our justices of our county palatine of *Chester*, greeting. The tenor of a certain record before us at *Westminster*, between *A. B.* plaintiff, and *C. D.* defendant, in a plea of trespass on the case, we send you inclosed herein, commanding that you (having inspected the same), by our writ of our said county, do command the sheriff of the same county, that he cause twelve free and lawful men, of the body of the said county, to come before you at your next session after this writ shall be delivered to you, each of whom having ten pounds a year at least of lands, tenements, or rents, by whom the truth of the matter may be the better known and inquired into; and who are in no-wise related either to the said *A.* or to the aforesaid *C.* to recognize and make a jury of the county between the said parties in the

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the plea aforesaid, because as well the said *A.* as the said *C.* between whom the controversy is, have put themselves upon that jury; and also, that you make such further process against the said jurors, so to be impanelled between the said parties, as are in this behalf used and commonly made, according to the law and custom of the said county, until the issue aforesaid, between the said parties, shall be fully tried; and when the verification and issue aforesaid shall be there made and tried before you, then do you send the record of the said plaint, together with every thing that shall then and there be done before you therein, and also this writ, to us at *Westminster*, at a certain day, which you shall appoint to the said parties to be there to hear judgment thereupon. Witness, &c.

Lee and Anthony.

Venire facias and distringas.

MAKE out the writs of *venire facias* and *distringas*. Get blanks at a stationer's (2 s. each); fill them up. If it be for a trial in *London* or *Middlesex*, the *venire* is tested the first return of the term in which the cause is to be tried, and returned some return day before the trial, and the *distringas* is tested the return day of the *venire*, and returnable the next return day after the day of trial.—If it be for a trial at the assizes, the *venire* is tested the first return of the preceding term to the assizes, and returnable the last day of that term, and the *distringas* is tested the return day of the *venire*, and returnable the first return of the next term after the assizes. These writs are not signed (sealing each

each 7d); but must be returned by the sheriff. If it be a country cause, the *venire* is returned by the sheriff's deputy in town, and the *distringas* by the under sheriff in the country. You pay to the sheriff, if in *Middlesex*, for the return of the *distringas*, 12s.

N O T E S.

1. Since the jury act 3 G. 2. c. 25. the *venire facias* must be *de corpore comitatus* in actions upon penal statutes. *French qui tam v. Wiltshire*. Hil. 11 G. 2. Str. 1085.

2. The *distringas* when at *nisi prius* was not stamped. Plaintiff afterwards stamped it; and Cur' would not set aside the verdict, since the penalty must have been paid, and then it is as good as if stamped at first. 9 & 10 W. 3. c. 25. sect. 59. M. 10 G. 1. *Taylor v. Lake*. 1 Str. 575.

Venire facias.

GEORGE the second, &c. to the sheriff of *Middlesex*, greeting. We command you, that you cause to come before us at *Westminster*, on next after, &c. (a) twelve free and (a) Some day lawful men of the body of your county, each before the of whom has ten pounds by the year, of trial. lands, tenements, or rents, at the least, by whom the truth of the matter may be the better known, and who are in no-wise of kin either to A. B. the plaintiff, or to C. D. to make a certain jury of the country between the parties aforesaid, of a plea of trespass on the case [as the action is;] because as well the said C. D. as the

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the said *A. B.* between whom the contention thereupon is, have put themselves upon that jury, and have there then the names of the jurors, and this writ. Witness, &c. Teste the first day of term.

Lee and Antonie.

Distringas.

GEORGE, &c. to the sheriff of *Middlesex*, greeting. We command you, that you distrain the several persons named in the panel annexed to this writ, [annex a panel, with the same names as returned in the panel to the *venire*, with their additions and places of abode]; the jury summoned in our court before us, between *A. B.* plaintiff, and *C. D.* by all their lands and chattels in your bailiwick, so that neither they, nor any one of them, lay their hands on them, until you shall have further command therein from us; and that you answer to us of the issues thereof, so that you may have their bodies before us at *Westminster*, on next

(a) The first return day after the day of trial.

(b) The day of the trial.

(c) If in *London*, say, or before, &c. at the *Guildhall* of the city of *London* afore said.

If at the assizes, say, or before our justices issued to keep the assizes in your

county, if they shall first come on, &c. [the day of the assizes] at [the place] in your county, according, &c.

after, &c. (a), or before our right trusty and well beloved our chief justice, assigned to hold pleas in our court before us, if he shall first come on, &c. (b) at *Westminsterhall* in the county of *Middlesex* afore said (c), according to the form of the statute in such case made and provided, to make a certain jury between the said parties of a plea of, &c. [as the action is]; and to hear their judgment of many defaults; and have there then the names of that jury, and this writ. Witness, &c. This writ is to be tested on the return day of the *venire*.

Lee and Antonie.

Indorse the attorney's name.

[the day of the assizes] at [the place] in your county, according, &c.

NOTES.

1. An attachment was granted against *Rolfe Bayley*, an attorney, for not attending at the assizes upon a *subpœna*, and tender of his charges, whereby the plaintiff was nonsuited. T. 2 G. 2. *Wyatt v. Wrickworth*. 2 Str. 810. Lord Raym. 1528. E. 2 G. 2. Attachment against one *Wyatt*, for not attending *Japhet Crook's* trial. *Ibid.*

2. A witness was served with a *subpœna* at *Chester*, to attend at the sittings at *Guildhall*, and two guineas were tendered by the person who served it; and being objected to, as too little, he declared he would give no more. The witness not coming up, an attachment was moved for, and on shewing cause discharged; the court saying, it was too little, and that the witness is not obliged to trust to the court's allowing him more when he comes to the book; for perhaps the party may not call him; and then it may be difficult for him to get home again; that this way of punishing, as for a contempt, was new, and practised only in this court, the C. P. not doing it to this day, but leaving the party to his remedy on the *stat. 5 E. c. 9*. And therefore they would not enter into any nice calculations of the expence, but confined their inquiry to the question, whether the non-attendance was through obstinacy or not. E. 14 G. 2. *Chapman v. Pointon*. 2 Str. 1150.

3. An attachment was moved for against a witness for not attending, being *subpœna'd*, and having a shilling left. But it appearing not to be personal service, the court held it not sufficient

ficient to warrant a proceeding *criminally* against him, whether it would do in an action they would not declare. It was also said, that tho' a shilling is what is constantly given with a *subpæna*, yet if the witness comes far, there ought to be a tender of reasonable charges. *M. 10 G. 2. Smalt v. Whitmill. Str. 1054.*

4. Defendant summoned one *Turner*, a witness, to attend the trial of the cause; who, on service of the *subpæna*, said, he would not attend, but run the hazard of forfeiting the 100*l.* penalty; and, on affidavit of this, defendant moved for an attachment, that he might not be put to bring his action on the statute, saying, they do it every day in Chancery, even for not attending a master upon his summons. *Cur.* made a rule to shew cause, which was discharged this term, it appearing, that the *subpæna* was not served till two in the afternoon in the city, to attend the sittings that day in *Middlesex*, which the court said was too short notice; and that witnesses ought to have a reasonable time to put their own affairs in such order, that their attendance upon the court may be as little prejudice to them as possible. *Hil. 8 G. 1. Hammond v. Stewart. Str. 510.*

Subpœna to testify.

GEORGE the second, &c. to *A. B. C. D. E. F. G. H.* (you may put four witnesses in a *subpœna*), greeting. We command you, that, all and singular businesses and excuses being laid aside, you and every one of you be in your proper persons before our right trusty and well-beloved

beloved our chief justice, assigned to hold pleas in our court before us at *Westminster-hall*, in the county of *Middlesex*, on, &c. (the day of the trial), to testify all and singular what you, or either of you, know in a certain action, now pending undetermined in our court before us, between *J. K.* plaintiff, and *L. M.* defendant, of a plea, &c. (as the action is); and at that day to be tried by a jury of the county; and this you or any of you are by no means to omit, under the penalty upon each of you of one hundred pounds. Witness, &c.

Teste this writ any day in term before the trial and service.

Lee and Antonie.

Indorse the attorney's name.

Subpoena ticket:

Mr. *A. B.*

BY virtue of a writ of *subpoena* to you directed, and herewith shewn unto you, you are personally to be and appear before chief justice of his majesty's court of King's Bench (a), on by o'clock in the

noon of the same day, at, &c. [the place], to testify the truth, according to your knowledge, in a certain cause now depending, and then and there to be tried, between *C. D.* esq; plaintiff, and *E. F.* defendant, in a plea of the part of plaintiff or defendant. And hereof you are not to fail, under the penalty of 100*l.* Dated the day of &c.

R. S. attorney for plaintiffs
[or defendants.]

(a) If to be tried before the chief justice; if not, say, before one of his majesty's justices of the court of King's Bench.

Note; the attorney generally writes on the ticket

thus: Please to inquire for Mr. *R. S.* (the attorney's name) at, &c. the place where the witnesses are to meet, in order to be ready when the trial shall come on.

If any of your witnesses should be in prison, you may have the following *habeas corpus*.

Habeas corpus ad testificandum.

GEORGE the second, by the grace of God, king of *Great Britain, France, and Ireland*, defender of the faith, &c. to the warden of our prison of the *Fleet*, greeting. We command you, that you have the body of *E. F.* detained in our prison under your custody, as it is said, by whatsoever name he may be charged, in the same prison, under safe and secure conduct, before our right trusty and well-beloved

(a) The day of the intended trial.

our chief justice, assigned to hold pleas in our court before us at *Westminsterhall*, in the county of *Middlesex* [or at *Westminster*, in the great hall of pleas there,] on the day of, &c. (a), at o'clock in the noon of the same day, there to testify the truth, to the best of his knowlege, in a certain cause now depending in our court before us, and then and there to be tried, between *A. B.* esquire, plaintiff, and *C. D.* gentleman, defendant, in a plea of trespass on the case (b); and then immediately after the said *E. F.* shall have then and there given his testimony before the said chief justice, to return him the said *E. F.* to our said prison, under the like safe and secure conduct; and have you there then this writ. Witness, &c.

(b) In an action of covenant, or as the case is.

Lee and Antonie.

Indorse the attorney's name.

Of examining witnesses on interrogatories.

IF a witness be going beyond sea, so that he cannot possibly attend the trial, he may, by rule of court, be examined before a judge at his chambers upon interrogatories; but notice of the time of examination must be given to the attorney on the other side, who may cross examine him; and the depositions so taken may be read as evidence at the trial of the cause.

The form of the interrogatories for the plaintiff.

Interrogatories to be administered to a witness, to be produced, sworn, and examined, on the part and behalf of *A. B.* plaintiff, against *C. D.* defendant, before knight, one of his majesty's justices of the court of King's Bench, pursuant to a rule of the said court, made on next after the morrow of *All Souls*, in the year of king *George the second*.

1. Do you know the parties, plaintiff and defendant, in the title of these interrogatories named, or either, and which of them? and how long have you known them, either, and which of them? Declare.

2. Do you know the hand writing, &c.? [Here proceed to the matters necessary for the witness to prove.]

Interrogatories for the defendant.

Interrogatories to be administered to

a witness, to be produced, sworn, and examined, on the behalf of C. D. defendant, at the suit of A. B. plaintiff, before, &c. [As before.]

The interrogatories must be signed by counsel.

After the witnesses are examined by both parties, the judge's clerk will deliver out copies of the depositions to each party.

Subp' ad test' (a).

(a) For notes on a *subp'na ad test'*, see p. 157. title notes. For a *subp'na* to testify, see p. 158. For a *subp'na* ticket, see p. 159. For an *babeas corpus ad test'*, see p. 160.

GET a blank (2s. 1/2); fill it up. You may put four witnesses in one *subp'na*. Make a note for the office (b). Sign the writ with Mr. Heberden; pay 1s. 8d. sealing 7d. Tested any day in the term before the trial and service. Each witness must be served with a ticket, and paid 1s.

(b) Note for the office.

Middlesex, to wit, a *subp'na* to testify for A. B. plaintiff, against C. D. defendant, of a plea of trespass upon the case.

J. P. attorney,
Aug. 1759.

Entering

Entering causes for trial.

In London or Middlesex.] Causes for trial must be entered in the marshal's book, two days at least *exclusive* before the sitting whereon they are to be tried, or the marshal may enter a *re recipiatur* at defendant's request. 15 E³ 16 Car. 2.

By notice fixed up in K. B. office, M. 17 G. 2. no record, or writ of *nisi prius*, will be received at any sitting *after* term in *Middlesex*, unless delivered to and entered with the marshal, *within* two days after the *last* day of every term; nor at any sitting *after* term in *London*, unless delivered to and entered with the marshal, the day *before* the day to which the sittings in *London* shall be first adjourned. And every *nisi prius* cause in *London* and *Middlesex* must be tried in the order in which it is entered (beginning with *remanets*), unless ordered to the contrary by the judge, on reasonable cause shewn in open court.

At the assizes.] The writ and record of *nisi prius* to be entered together, and no record to be received without the writ. T. 10 E³ 11 G. 2.—Writ and record of *nisi prius* to be delivered to be entered with the marshal before the first sitting of the court *after* the common day, except in the counties of *York* and *Norfolk*, and there the writ and record shall be delivered to and entered with the marshal, *before* the first sitting of the court, on the second day after the commission day. And every cause must be tried in the order it is entered in, unless ordered

The present Practice of the

to the contrary by the judge, on reasonable cause shewn in open court. *H. 14 G. 2.* Both rules by the twelve judges.

Postea.

[*After trial in London or Middlesex.*] The associate will deliver the record with the *distringas* and panel annexed, to the party's attorney that has a verdict, and then the attorney indorseth the *postea* on the back of the record, about two fingers from the top, with a margin about two or three fingers broad. — The substance of the *postea* is, that afterwards the plaintiff and defendant came by their attornies before the lord chief justice, or the judge of assize, and the jury were sworn; and then sets forth what verdict they found, and what costs they gave, as set down by the associate upon the back of the panel.

[*After trial at the assizes.*] The associate keeps the record and *distringas* till the beginning of the next term; and in the *interim* indorses the *postea* upon it, for which he receives his fee at the trial.

Posteas must be marked by the clerk of the *posteas* (now Mr.) within two days after he receives it. *Rule T. 2 Jac. 1.* But it is sufficient if the *postea* is marked at any time before the costs are taxed. Pay the clerk of the *posteas*, for marking the *deliberatur*, 6*d.*

NOTES.

NOTES.

1. In covenant the breach was assigned in non-payment of 270*l.* mortgage money. Verdict for 274*l.* 11*s.* damages, and the judge had entered it so in his minutes; but the clerk of *nisi prius* had only marked 1*s.* damages on the *distringas*. *Postea* ordered to be amended by the judge's notes. *M. 17 G. 2. Newcombe v. Green. 2 Str. 1197.*

2. On motion for a new trial, the *postea* was brought into court; and, after the new trial had been denied, the *postea* could not be found. *Cur'*, (on debate), ordered a new one to be made from the record above, and the *associate's* notes. *Hil. 20 G. 2. Dayrell v. Bridge. 2 Str. 1264.*

Postea for the plaintiff on non assumpsit.

Afterwards, (that is to say), on the day and at the place within mentioned, before knight, the chief justice, within written *A. B.* gent. being associated unto the said chief justice, by force of the statute in that case made and provided, the within named *C. D.* (the plaintiff), came by his attorney within contained; and the within named *E. F.* (the defendant), although solemnly required, came not, but made default. Therefore let the jurors of the jury within mentioned be taken [or accepted of] against him by his default (a).

(a) The
And meaning of
the words,

therefore let the jury be taken [or accepted of] against him by his default, is, when a cause is called on, and the plaintiff and defendant are called; if

the *defendant* does not answer or say any thing, when the panel is called over, by way of *challenge* to the *array*, or to the *poll*, then the court proceeds on to swear the jury; and the *defendant* not appearing to the panel, the cause is tried; and the entry upon the *postea* suggests, that the *defendant*, though solemnly required, did not come, but made default; therefore the jury are *taken*, or more properly *accepted* of by the court, through the *defendant's* default, though the defendant and his attorney might be there ready at the first calling of the cause. But notwithstanding this entry by default, the defendant may give evidence in the cause, and obtain a verdict against the plaintiff, in the same manner as if he had appeared when the panel was called over; for he loses no other advantage thereby, but that he cannot challenge any of the jurors.

Note; the *associate* and *crier* take each a fee for the defendant's default, though none be made, and the entry by default seems to be drawn up to warrant that fee.

(a) Verdict, that the defendant assumed *modo* & *forma*, without saying to whom, good. *Noy* 83.

And the jurors of that jury, being summoned, came; who, to say the truth of the within contents, being chosen, tried, and sworn, say, upon their oath, that the within named *E. F.* did undertake in manner and form (a) as the within named *C. D.* within complains against him; and they assess the damages of the said *C. D.* by occasion of the not performing the within mentioned promises and undertakings, over and above his costs and charges by him about his suit in this behalf expended, to pounds, and for those costs and charges to forty shillings. Therefore, &c.

Though since the late act of parliament there will be scarce any want of jurors, yet I have here inserted a postea with a tales.

Afterwards (that is to say), on the day and at the place within mentioned, before knight, the chief justice within written, there being associated unto him gent. according to the form of the statute in that

that case made and provided, came the within named *A. B.* by his attorney within contained; and the within named *C. D.* although solemnly required, came not, but made default; therefore let the jury, whereof mention is within made, be accepted of against him thro' default; and the jurors of that jury being summoned, some of them (that is to say), *E. F. H. J.* (*reciting the names of so many of the jury of the principal panel, which is annexed to your distringas, as you shall find there to have been sworn*); and because the residue of the jurors of the same jury do not appear, therefore other persons of those standing by the court, by the sheriff of the county aforesaid, at the request of the said *A.* and by the command of the said chief justice (*if in London or Middlesex*), *if at the assizes, then* by the command of the said justices, are now newly set down, whose names are affiled in the within written panel, according to the form of the statute in that case made and provided; which said jurors, so newly set down (that is to say), *T. K. &c.* (so naming the rest of the *talesmen*), being required came, who, together with the said other jurors before impanelled, and sworn to declare the truth of the within contents, being elected, tried, and sworn, upon their oaths declare, that the said *C. D.* did not undertake, &c. (*as the issue is*), in such manner and form as the said *A.* has within complained against him; and they assess the damages of the said *A. B.* by reason of not performing the promises and undertakings within written, besides his expences and costs laid out by him about his prosecuting this cause, to and for his expences and costs to Therefore, &c.

Postea for plaintiff on non est factum,

Say, upon their oath, that the within mentioned writing obligatory is the deed of the within named (the defendant), as the within written (the plaintiff), has within declared against him, and they assess the damages of the within named (the plaintiff), by occasion of detaining the within written debt, over and above his costs and charges, by him about his suit in this behalf expended, to and for his costs and charges to forty shillings. Therefore, &c.

Postea for the plaintiff on nil debet,

Say, upon their oath, that the within named C. D. doth owe to the within named A. B. the 20 l. within mentioned, in manner and form as the said A. B. within complains against him; and they assess the damages, &c. *ut supra*.

For the plaintiff in trespass.

Say, upon their oath, that the within named C. D. is guilty of the premisses within laid to his charge, in manner and form as the said A. B. within complains against him; and they assess the damages of the said A. B. by occasion thereof, over and above his costs and charges, &c. *as before*.

Postea

Postea for plaintiff on issue of plene administravit.

Say, upon their oath, that the said *A.* (the defendant), hath, and on the day of exhibiting the bill of the said *C.* within written, to wit, on the day of in the year of the reign of our sovereign lord the present king, had, divers goods and chattels, which were of the said at the time of his death in her hands to be administered, to the value of the debt within specified, whereof she might have made satisfaction to the said *C.* for his said debt, to wit, at within contained, in the county aforesaid; and they assess the damages of the said *A.* by occasion thereof, besides his expences and costs by him about his suit in this behalf expended, to and for his expences and costs to forty shillings. Therefore, &c.

Postea for plaintiff in trespass and ejectment, upon not guilty.

Say, upon their oath, that the said *C.* is guilty of the trespass and ejectment within written, in manner and form as the said *B.* doth within complain against him; and they assess the damages of the said *B.* by occasion thereof, over and above his expences and costs laid out by him about his suit in this behalf, to 12*d.* and for his expences and costs, to Therefore, &c.

Postea

Postea for plaintiff on non assumpsit infra
sex annos.

Say, upon their oath, that the said
within six years next before the within written
day of exhibiting the within specified bill of the
said to wit, on the first day of April,
in the year of the reign of our sove-
reign lord George the second, now king of Great
Britain, &c. in the within written declaration
specified, undertook in manner and form as the
said has within by replying alleged;
and they assess, &c.

Plaintiff non-prossed.

And the jurors of that jury, being summoned,
came; who, to say the truth of the within con-
tents, were chosen, tried, and sworn; and,
after evidence being given to them of and upon
the within contained, went from the bar of this
court to discourse of their verdict of and upon
the premisses; and after the said jury had dis-
coursed and agreed among themselves, they
came back to the said bar to give their verdict
in this behalf; upon which the said
(naming the plaintiff), being solemnly required,
came not; nor did he further prosecute his
said bill against the said (naming the
defendant). Therefore, &c.

The entry where a juror is withdrawn.

Being elected, tried, and sworn, to declare the truth of the within contents; whereupon for certain causes moving as well the said chief justice (if in *London* or *Middlesex*; if at the assizes, say, as well the said justices), as the parties, *C. D.* one of the jurors of the within mentioned jury, was withdrawn from the panel, and the residue of the jurors of that jury are intirely discharged from giving any verdict of and concerning the within mentioned premisses, &c.

For the defendants, on not guilty in trespass.

Say, upon their oath, that the said *C. D.* and *E. F.* are in no-wise guilty of the trespass in the declaration within specified, as the said *C.* and *E.* having by their pleading within alleged. Therefore, &c.

For the defendant in trespass, on the statute of limitations pleaded.

Say, upon their oath, that the said *C.* did not, at any time within six years next before the suing out of the said writ, break and enter the house of the said *A.* nor take and carry away the goods and chattels and money of the said *A.* within contained, as the said *A.* has within by pleading alleged, &c.

For

For the defendant on plene administravit.

Say, upon their oath, that the within named *John*, at the time of exhibiting the bill of the said *James* within contained, had fully administered all the goods and chattels, which were of the said *T.* at the time of his death, in his hands to be administered; and that he the said *John* hath not, nor on the day of exhibiting the within specified bill, or at any time afterwards had, any goods or chattels, which were of the said *T.* at the time of his death, in his hands to be administered, wherewith he was able to pay the debt within specified, or any part thereof, to the said *James*, as he the said *John*, in his within written bar (or plea) hath alleged by way of defence. Therefore, &c.

Or you may say, "or any part thereof, to the said *James*, as he in bar of the said *James* has within by pleading alleged." Therefore, &c.

For defendant, an executor, that his testator non assumpsit.

Say, upon their oath, that the within named *C. D.* the testator, did not in his life-time undertake, in manner and form as the said hath within declared, &c.

Postea upon an issue of solvit ad diem.

Say, upon their oath, that the within written *C. D.* in his life-time, after the within mentioned

tioned day of mentioned in
the within written condition, and before the
day of exhibiting the within written bill, did
not pay to the within named *A. B.* the within
mentioned sum of and all interest due
for the same, as the said *L.* hath within for that
purpose alleged in his plea; and they assess the
damages of the said *G.* by reason thereof, be-
sides the expences and costs laid out by him
about his suit in this cause (or this behalf) to
12*d.* and for his expences and costs to 20*s.*
Therefore, &c.

In replevin on an issue, non cepit and tender.

Being elected, tried, and sworn, to declare
the truth, as to the taking and unjustly detain-
ing of one black gelding, parcel of the within
written three geldings, within supposed to have
been taken and unjustly detained by him the
said *J.* in the first issue within mentioned, joined
between the said parties, say, upon their oath,
that the said *John* did neither take or detain the
said black gelding, as the said *Joseph* hath with-
in alleged in pleading thereto; and as to the
within mentioned grey gelding, specified in the
second issue joined between the said parties, they
further say, upon their oaths, that the said *Jo-
seph* did not tender payment, to pay to the said
John, of the within mentioned six pounds and
six shillings mentioned in the within written
plea, as the said *James* hath alleged by way of
rejoinder thereto. Therefore, &c.

A verdict in replevin for the defendant.

Say, upon their oath, that the said *John*, on the within mentioned day of the within written year of the reign of our said sovereign lord the king, within specified in the declaration of the said *Joseph* and *William*, did not of his own proper injury, or without any such cause alleged by the said *H.* in his within written avowry, in the within mentioned place in which, &c. take the goods and chattels within contained of the said *Joseph* and *William* within specified, and detain them until, &c. as the said *John* hath within alleged in his defence. Therefore, &c.

Postea in assault and false imprisonment; part for the plaintiff, and part for the defendant.

Being elected, impanelled, and sworn, to declare the truth of the within contents, as to the issue joined between the said *John* and the said *James*, declare, upon their oath, that the said *James* is not guilty of the premisses within charged upon him, as the said *James* hath within alleged in making his defence thereto. And as to the first issue joined between the said *John* and the said *Francis* (that is to say), as to the coming with force and arms, and whatsoever else that is against the peace of our sovereign lord the king that now is; and also as to the whole trespass within mentioned, except the assaulting,

assaulting, beating, and ill-treating, taking, and imprisonment, and in prison detaining and keeping the said *John* by the space of eight hours within mentioned, part of the within mentioned twenty-four hours, the said jury, upon their oaths, further say, that the said *Francis* is guilty thereof, in such manner and form as the said *John* within complains against him: And as to the second issue within mentioned, joined between the said *John* and the said *Francis* (that is to say), as to the assaulting, beating, ill-treating, taking, and imprisoning, and in prison detaining and keeping of the said *John*, by the said space of eight hours, the said jury, upon their oaths, further say, that the said *Francis*, the day and year specified in the declaration within written, of his own proper injury, without any such cause as by him the said *Francis* is within pretended in his plea, in the parish of in the within specified county, made an assault upon the said *John*, and beat, ill-treated, took, imprisoned, and in prison there detained and kept the said *John*, in such manner and form as the said *John* doth within complain against him; and they assess the damages of the said *John*, by reason thereof, besides his expences and costs, expended by him about his suit in this cause [or behalf], to forty shillings; and for his expences and costs to twenty shillings. Therefore, &c.

Postea

*Postea in case for continuing the stopping up
of the plaintiff's lights.*

Being elected, tried, and sworn, to declare the truth of the within contents, upon their oath, say, that as to the continuing the building in the within written declaration, in the issue joined between the within mentioned parties, to be built and erected by the said *Joseph*, the said *Joseph* is guilty in such manner and form as the said *A.* within complains against him. And by reason of continuing the said building last mentioned, by the said *Joseph* within mentioned to be built and erected, they assess the damages of the said *A.* besides his expences and costs expended by him about his suit in this behalf to and for his expences and costs to and as to the continuing the building or edifice, within specified in the said declaration first within mentioned to be built and erected by the said *Joseph*, if it should happen judgment upon the within written demurrer in law thereon, whereof the said parties have submitted themselves to the judgment of the court, should be given for the said *A.* against the said *Joseph*, then the said jury do assess the damages of the said *A.* against the said *Joseph*, by reason of the continuation of the said edifice first above mentioned to be erected and built by the said *Joseph*, besides his damages and costs aforesaid, above put in issue by him for the continuance of the said first mentioned edifice, erected and built as aforesaid, to one penny. Therefore, &c.

Concerning

*Concerning setting aside a verdict, new trial,
and arrest of judgment.*

1. No judgment, given either for plaintiff or defendant upon a writ of *nisi prius* or inquiry, can be entered until the expiration of four days, exclusive of the entry of a rule for judgment, during which four days the party against whom the judgment is given, may first move for a new trial; and, after it be denied, may move in arrest of judgment, but cannot move for a new trial, after he hath moved in arrest of judgment, and failed.

2. You cannot move in arrest of judgment till the *possea* is brought into court, and therefore the party must move for a rule to bring it in.

3. On a contract for stock between the plaintiff and J. S. they each deposit 200*l.* in defendant's hands, and J. S. not performing his agreement, the plaintiff sues for the deposit, and had judgment on demurrer, and took out a writ of inquiry, and proved his case; but the jury, on a notion that the defendant could not pay out the money without consent of both parties, gave 1*d.* damages; which was now set aside, the court saying, that the rule of not setting aside verdicts for the *smallness* of the damages did not extend to this case, where the jury mistook in point of law; and the chief justice said, he knew no reason why the court should not interpose in the other case. *E. 7. G.*

1. *Woodford v. Eades et al*, *Str.* 425.

4. An action was brought for these words spoken of the plaintiff as a wine merchant,

This seems
to be the
reporter's
quare.

"you are a rogue, villain, and rascal, and sell
"by short measure." The jury gave 20*s*,
damages; and though it was thought a hard
case, yet the court said, it has always been de-
nied to set aside a verdict for *smallness* of da-
mages, and therefore denied it in this case,
Quare tamen, why it is not within the reason of
setting aside a verdict for *excessive* damages?
M. 6 G. 2. Hayward v. Newton, Str. 940.

5. After verdict for the plaintiff in an action
for a libel, the judgment was arrested, because
it was not laid, that the libel was of or con-
cerning the plaintiff. *Cro. Jac. 126.* was cited,
E. 5 G. 2. Lowfield v. Bancroft et al, Str.
934.

6. *Per Cur'*; after judgment on demurrer,
the defendant shall not come to arrest the judg-
ment on return of the inquiry, for an exception
that might have been taken on arguing the de-
murrer. The parties cannot be said to come
in as *amici Cur'*, nor shall any body tell us, that
the judgment we gave on mature deliberation is
wrong; it is otherwise indeed in the case of
judgment by default, for that is not given in so
solemn a manner; or if the fault arises on the
writ of inquiry, or verdict, for there the party
could not allege it before. (Cites *How v. God-
frey, M. 4 G. 2.*) *E. 7 G. 1. Edwards v.*
Blunt, Str. 425.

7. Motion in arrest of judgment may be
made any time before judgment signed. *Str.*
845.

8. In trespass, the defendant justifies under a
distress for rent, and shews, that he gave notice
according to the statute, had the goods ap-
praised by persons sworn before the headborough,
and

and sold, and the surplus left in the hands of the constable. The plaintiff replied, *de injuria sua propria absque tali causa*; on the trial verdict for the defendant: But, upon motion, the court set aside the verdict, and ordered judgment to be entered for the plaintiff, and a writ of inquiry of damages to issue. For, by the defendant's own shewing, the sale cannot be justified, it appearing there was a *constable* present, so that the *beadborough* had no power to administer the oath. (Cites *Cartbew* 370). T. 4 G. 2. *Broome v. Rice et al* in C. P. Str. 873.

Final judgment on postea.

Cause tried at the sittings in London or Middlesex, within term,] If plaintiff hath a verdict, after the trial give a rule for final judgment with the clerk of the rules (pay 1 s. 10 d.) which will be out in four days exclusive after entered (a); in which time defendant may move for a new trial, or in arrest of judgment, or bring a writ of error; but if he does not, and the rule for judgment is out, stamp the *postea* with a double 2 s. 6 d. stamp. Get the *postea* marked by Mr. Haddock, pay him 6 d. then the master will tax costs (b) *de incremento*, and sign final judgment (c), which enter on the roll; and if the roll be already carried in, then carry the *postea* to Mr. Tully, and he will enter the final judgment.

(a) Sunday, or any other day on which the court doth not sit, is not reckoned one of the four days, unless the rule be entered on the last day of the term, or within four days after the term;

during which four days these rules are entered as of the last day of the term. (b) Defendant's attorney may take out a fide bar rule to be present at taxing costs, and then plaintiff's attorney must give notice of taxation, having been first served with a copy of such rule. (c) If either of the parties die, execution cannot be taken out upon the judgment, till a *sci' fa'* sued out, and judgment thereupon obtained. See *Stat. 8 & 9 W. 3. c. 10.*

Cause tried in London or Middlesex at the sittings after term, or at the assizes.] In either case you cannot give a rule for final judgment till the first day of next term, and then proceed as before directed.

N O T E S.

1. A rule for final judgment, where the cause is tried *within* term, may be given at any time within four days after the end of the term.

2. The rule for final judgment ought not to be entered before the day in bank, and is not necessary if the plaintiff be nonsuited; for, in that case, judgment may be entered immediately after the day in *bank*.

3. In *London or Middlesex*, the party that has a verdict enters the *possea* on record, but in other counties the associate.

4. If plaintiff be hung up for a year from taking out execution by an *injunction*, he must have a *sci' fa'*; and *Cur' said*, the *stat. West. 2.* which is *infra annum*, must be computed by *calendar* months. *E. 6 G. 1, Winter v. Lightbound, 1 Str. 301.*

5. Judgment ordered to be entered *nunc pro tunc*, where the party died pending the time the court took to advise. *T. 1 G. 1. Baller v. Delander. E. 7 G. 1. Cumber v. Wane, 1 Str. 427.*

6. About 20 years since *A.* obtained judgment against *B.* but it was never entered up. There being a decree for the payment of *B.*'s debts in a course of administration, *A.* to have a preference before other creditors, moved to have

have the judgment entered up *nunc pro tunc*; but *Cur'* refused to do it (though by not being docquetted it could not affect purchasers), it being at such a distance of time, that the presumption was, that the debt was satisfied. *M. 12 G. 1. Flower v. earl of Bolingbroke, Str. 639. M. S. Rep. S. C. & P.*

7. Judgment may be reversed in part, and affirmed *pro residuo*. *Str. 808.*

8. The court of *B. R.* had long refused to set aside a judgment which was regular, on putting the plaintiff in as good a condition; but they now do it as well as *C. B.* *Hil. 2 G. 2. Fox v. Glas, Str. 823. Salk. 518.*

9. Trespass against two defendants; one suffers judgment to go by *default*, and the other pleads *a distress for rent, and a licence from the plaintiff to sell the goods*; upon which issue was joined, and a verdict for the defendant. Motion to stay the judgment against the *other* defendant, since upon the whole record it appears the plaintiff has no cause of action. *Et per Cur'*, judgment was arrested as to both. *M. 11 G. 1. Brigs v. Greinfeild & Bengel, Str. 610.*

10. The plaintiff cannot enter a *remittit* in another term. In debt upon an old judgment, the plaintiff laid the *ad damnum* to 10*l.* the jury gave interest, which came to 30*l.* and for that and costs judgment was entered up. And after error brought, the plaintiff moved to have liberty to *remit* the *surplus*, and enter judgment for 10*l.* only. *Cur'* held it could not be done in another term. And the instances of reversing judgments for this fault, shew' it was never thought to be amendable. (Cites *Yelv. 45.*) *T. 12 G. 2. Wray v. Lister, Str. 1110.*

Judgment by default, or confession.

(a) If the action is in case, trespass, &c. the first judgment is only *interlocutory* till inquiry executed.

(b) In debt the first judgment is *final*.

(c) Immediately after *final* judgment is signed, you may take out execution.

MAKE an *incipitur* of the declaration on a treble 1 d. stamped paper, if the judgment be *interlocutory* (a). On a double 2 s. 6 d. stamped paper, if it be *final* (b). In both cases enter an *incipitur* on the roll. Carry judgment paper, and roll to Mr. Child, and he will sign judgment. If judgment *final*, get the *master* to tax the costs (c). But you give a rule for judgment as on a *posse*, (*Vide* p. 179.) Compear your judgment on the roll. Docket and carry it in, &c. If *interlocutory*, then proceed to execute your writ of inquiry. *Vide* p. 186.

N O T E S.

After a plea the defendant may, *relucta verificatione*, confess the action. See *Ld. Raym.* 345.

(d) On arrest upon *in fine* process. *Vide* 184, note 8. p. 185, note 12. p. 186, note 17.

1. Defendant often after declaration will, on stay of execution, give judgment by *cognovit actionem*. And in case, &c. to save a writ of inquiry, admit damages, usually by writing in the margin of the draught of the declaration thus: "I acknowledge this action, and admit that the plaintiff hath sustained damages to —;" and sometimes these words are added; "and I promise not to bring a writ of error."

2. Where defendant is in custody (d), and gives a warrant of attorney to confess a judgment, he must have an attorney present, who signs the warrant as witness. The warrant to be produced when the judgment is acknowledged; or, (on motion) the judgment may be set aside.

3. On a warrant of attorney to confess a judgment, common bail must be filed, otherwise it is error.

4. Judgment

4. Judgment to be entered of the term mentioned in the warrant of attorney. But if the warrant be to confess judgment generally, without expressing any particular term, or does express, that it be entered of a *particular* term, or any term *subsequent* to it, judgment may be entered of any *subsequent* term.

5. But if judgment on a warrant of attorney is *not* entered up *within a year and day after the warrant given*, it cannot be done without moving the court, on an affidavit, that defendant is alive, the debt or part thereof unsatisfied, and the due execution of the warrant; and thereon a rule will be made, which file with Mr. Child when you enter up judgment.

6. *A.* (the defendant's testatrix), 9 Feb. 1729, gave a warrant of attorney to confess a judgment. 18 April 1730, *A.* died, and the judgment was signed 22 April as a general judgment of *Easter* term, which began the 15th. On motion to set it aside, it was insisted, that by the death of the party the warrant was countermanded; but *per Cur'*, it being the course of the court to enter the judgment as of the first day of the term, they could not alter it on consideration of the circumstances that attend a particular case; besides, this seems to be established by the statute of frauds, which provides for purchasers, but has given no remedy for this. *M. 4 G. 2. Fuller v. Jocelyn, Str. 882.*

7. On the 11th of Nov. about 12 at noon, a motion was made to enter up a judgment upon an old warrant of attorney, and an affidavit was produced, sworn the day before, of the party's being alive, and the debt unpaid; upon which the court made the common rule. Motion to discharge the rule upon an affidavit, that the

defendant died the day the first motion was made, at seven of the clock in the morning; and it was insisted, that this was a surprize upon the court; and on great debate the court declared, that if it had then appeared that the man was dead, they would not have made the rule; but they applied the maxim *feri non debet factum valet* to this case, and compared it to the cases *Salk. 82.* and *Fuller v. Jocelyn ante;* and thus suffered the deceit which had been put upon them to prevail. *M. 11 G. 2. Chancy v. Needham, Str. 1081.*

8. Held *per Cur.*, that the presence of an attorney of C. B. at the execution of a warrant to enter up judgment in B. R. was sufficient. *M. 9 G. 1. Bland v. Pakenham, 1 Str. 530.*

So *E. 1 G. 1.*
in C. B.

Baldwin v.
Church.

One executor
pleaded a
good plea,
and the other
a bad one.

On demurrer,
judgment was
given in C. P.
for both the
defendants,
but reversed
on error, and

a new judg-

ment given for the plaintiff against one executor only. This is really eloping the others from saying they are not executors, and being without their knowledge, it may be subjecting them to a *devastavit* for the paying of other debts. *Ibid.*

9. There were three executors, and one of them gave a warrant of attorney to confess a judgment against himself and his co-executors, pursuant to which a judgment was entered against all the executors, *de bonis testatoris*, for the debt, and against the executor who gave the warrant, *de bonis propriis*, for the costs. Upon motion to set it aside, it was held to be ill; for executors may plead different pleas, and that which is most for the testator's advantage shall be received. *1 Roll. Abr. 929. A. 1. B. 5.* Judgment set aside. *M. 3 G. 1. Elwell v. Quash et al', 1 Str. 20.*

10. If the defendant appear and imparle until the first day of the next term, and die after the day in *bank*; yet if a rule be given for answer, and no plea be pleaded, judgment may be entered against him that next term by default, as of the first day of the term.

11. Motion to enter up judgment on an old warrant of attorney, the defendant being living, and the debt unpaid; but it appearing, that the party to whom the warrant was to confess, was dead, *Cur'* would not grant the motion. *M. 13 G. 1. Wild v. Sands, Str. 718.*

12. The court set aside a judgment entered upon a warrant of attorney given in *Ireland* by defendant, whilst in custody on *mesne* process, because his attorney was *not* present. *Hil. 19 G. 2. Fitzgerald v. Plunket, 2 Str. 1247.*

13. Leaving out *super se assumpsit* is ill on a *Ld. Raym.* judgment by default, there being no promise ^{1516.} actually laid in the declaration. Held so in error. *Hil. Lee v. Welch, 2 Str. 793.*

14. Judgment by warrant of attorney given to testator's executor set aside, because by relation it was in testator's life-time. *M. 13 G. 2. Gainsborough, executor of Gainsborough, v. Foll-yard, Str. 1121.*

15. Warrant of attorney was given in 1732, to confess a judgment for *Crompton*; in the record it was made *Compton*. *Cur'* refused to amend it by the warrant, for fear of inconvenience to purchasers. *E. 17 G. 2. Sale v. Crompton, 2 Str. 1209.* Observe this was an old judgment.

16. A warrant of attorney, and release of errors, both in one instrument, of a day in term in which judgment is signed, good; for
per

per Cur', if we take in the *legal* relation, as we ought to do, in order to give every part of the deed its proper operation, then the judgment will stand as a judgment of the first day of the term, and a release after. *M. 18 G. 2. London v. Pickering, 1215.*

17. One in execution may give a warrant of attorney to confess a *new* judgment, without the presence of his attorney. *Hil. 19 G. 2. Watkins v. Hanbury, 2 Str. 1245.*

Writ of inquiry.

(a) The notice to express the hour and place.

Of notice of executing it.] If executed in *London* or *Middlesex*, and defendant lives *within* forty miles from *London*, eight days notice (a) to be given, exclusive of the day it is given; if above forty miles, fourteen days notice exclusive; and if executed in the country, eight days notice exclusive.

Where plaintiff concludes *ad patriam* upon defendant's plea, and gives notice of trial upon the paper book; and thereupon defendant demurs in law upon plaintiff's replication, and plaintiff joins in demurrer, and gets judgment; defendant's attorney shall accept notice of inquiry from the time of giving such notice of trial. *Rule H. 8 G. 1.*

Making out writ of inquiry, and executing it, &c.] Write it on a double 12 d. stamped piece of parchment, not to be signed; sealing 7 d. You may sue out a *subpœna* for your witnesses as in cases of trial. Indorse the place where you have given notice

notice for the execution. Carry the writ of inquiry to the sheriff two days before you execute it, and he will summons a jury. In *London*, you pay 1*l.* 7*s.* 4*d.* and for every witness sworn 4*d.* In *Middlesex*, and most counties 1*l.* 10*s.* 6*d.* The inquisition must be stamped with a double 2*s.* 6*d.* stamp. A rule must be given for *final* judgment, which when expired, tax costs, and enter up judgment as upon a *postea*. *Vide p.* 179. You may give the rule for *final* judgment the day the writ is returnable.

Defendant may have a rule to be present at taxing costs. See *p.* 179, *note (b)*.

NOTES.

1. A writ of inquiry cannot be executed on a *Sunday*, and *Cur'* is bound to look into the almanack. *Hoyle v. Lord Cornwallis, Str.* 387.

2. *Cur'* set aside a verdict given upon a writ of inquiry for smallness of damages, the jury being mistaken in point of law. *E. 7 G. 1. Woodford v. Eades et al', Str.* 425. See *p.* 177, *notes 3, 4.*

3. Upon executing the inquiry, plaintiff was surprised with a defence, and not prepared to prove his whole demand. *Cur'* set it aside on payment of costs, the damages being too small. *E. 8 G. 1. Hall v. Stone, Str.* 515.

4. *Where there are issues in fact and in law, the plaintiff may waive the issues in fact, and take out an inquiry upon the demurrer.* As where there were four counts in the declaration; *non assumpsit* pleaded to three, and a demurrer to the fourth. After judgment on demurrer, plaintiff takes out a writ of inquiry, and executes it. Motion to set it aside, there being no *nolle prosequi*

prosequi on the roll; and it was insisted, that plaintiff ought to take out a *venire, tam* to try the issue, *quam* to inquire of the damages upon the demurrer. *Sed per Cur'*, That is the course where the issues are carried down to be tried before the demurrer is determined, and in that case the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for upon that count, there is no reason why we should force him to carry down the cause to *nisi prius*. And as to the want of a *nolle prosequi* upon the roll, he may supply that when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment upon the inquiry must stand. *M. 9 G. 1. Fleming v. Langton, Str. 532.*

5. In an action upon the case upon two promises, there was judgment for the plaintiff as to the first promise, and as to the second a *nolle prosequi*. A writ of inquiry is taken out to inquire what damages the plaintiff had sustained *occasione præmissorum*; and, upon the return of this, it was moved to amend the writ, and make it *occasione non performance præd' primæ promissionis*; and upon the authority of *Baker v. Cambell, E 4. Ann. in B. R.* the writ was amended in this case, the record of the judgment by default being a warrant to amend by. *Hil. 12 G. 1. Hughes v. Alverez, Str. 684.*

6. *Cur'* will give costs for not executing an inquiry according to notice. *M. 13 G. 1. Sutton v. Bryan, Str. 728.*

7. Upon executing a writ of inquiry before the *Ch. J.* plaintiff could not prove the quantity

tity of goods for which the action was brought, for want of a servant who was absent, through an apprehension they should not want his testimony.—And upon consideration the *Cb. J.* held, that he might adjourn it to the next sittings; and accordingly the jury were adjourned over, plaintiff submitting to pay costs. *Cb. J.* compared it to the case of a coroner's inquest, or a commission of lunacy, where the jury are adjourned over several times, it being but an inquest of office. *Hil. 3 G. 2. Coleman v. Mawby et al, Str. 853.*

8. Held upon debate, that the want of a writ of inquiry is aided by the statute of *Jeofails*, though it was insisted to be such a fault as could not happen in the case of a verdict. *M. 4 G. 2. Mallory v. Jennings, Str. 878.*

9. A writ of inquiry was executed in *T. 1728*, and costs taxed, but no final judgment entered up. There being occasion to prove the debt in Chancery, the writ of inquiry could not be found. A rule was made for a new writ of inquiry and inquisition, according to the sheriff's notes; and that the master should indorse the costs, which by the commitment book appeared to have been taxed. *N. B.* No cause was shewn against the rule. *T. 10 G. 2. Bean v. Elton, 2 Str. 1077.*

10. Interlocutory judgment was signed *T. 1737.* and in *August 1738.* a writ of inquiry was executed upon eight days notice; which was set aside as irregular. Held, that where a term's notice of trial is required, there must, at the same distance of time, be the like notice of executing a writ of inquiry. *M. 12 G. 2. Peyton v. Burdus, 2 Str. 1100.*

11. If

11. If the execution of a writ of inquiry of damages be set aside for irregularity, and the court thereupon makes a rule, *that the writ of inquiry between the parties shall be executed de novo*, the plaintiff must sue out a new writ, and cannot regularly proceed on the old one, by erasing out the return, &c. and making a new return, &c. *Hil. 13 G. 1. Cole v. Vaughan, M. S. Rep.*

12. Notice was to execute a writ of inquiry of damages *by ten of the clock*. There being *no defence*, *Cur'* set it aside for *incertainty*. *M. 14 G. 2. Ison v. Ashley, 2 Str. 1142.*

Cites 2 Roll.
Abr. 673,
674.

13. The execution of a writ of inquiry before fourteen jurors was held good; for it is but an inquest of office, whereon *no attainit lies*. *M. 15 G. 2. Chester v. Crawley, 2 Str. 1159.*

14. *Cur'* will set aside a writ of inquiry for smallness of damages, and order a new writ of inquiry on payment of costs. *T. 19 G. 2, Markbam v. Middleton, 1259.*

The form of a writ of inquiry.

Inquiry executed on the day of the return, good.
2 *Ld. Raym.*
1449.

GEORGE the second, &c. to the sheriff of *Middlesex*, greeting. Whereas *A. B.* lately in our court before us at *Westminster* by bill without our writ impleaded *C. D.* being in custody of the marshal of our *Marshalsea*, before us for this cause, to wit, that whereas the said *C. D.* on [*Here set forth the whole declaration, only instead of saying, in the year of the reign of our, &c. say, in the year of our reign.*] To the damage of the said *A. B.* of pounds, as he saith; and such proceedings were thereupon had in our said court before us, that the said

said *A. B.* ought to recover his damages against the said *C. D.* by reason of the premisses; but because it is unknown to our court before us, what damages the said *A. B.* hath sustained by the means aforesaid, we therefore command you, that by the oath of twelve (a) good and law-ful men of your bailiwick, you diligently inquire what damages the said *A. B.* hath sustained, as well by means of the premisses, as for his costs and charges by him about his suit in this behalf expended *, and make appear to us at *Westminster*, on next after, &c. (the return) the inquisition which you shall thereupon make, under your seal, and the seals of them by whose oath you shall take that inquisition; and have there then this writ. Witness, &c.

(a) There cannot be less than twelve, See 1 Vent. 113.

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* Or, and the inquisition which you shall take thereof, do you send to us at *Westminster*, on, &c. under your seal, and the seals of those by whose oath you shall take such inquisition; and have you there, &c.

The continuance and return of the inquisition.

AT which day came the said *A. B.* before our sovereign lord the king at *Westminster*, by his said attorney; and the sheriff (that is to say) Sir knight, sheriff of the said county of returned an inquisition taken before him at the castle of in the said county of on the day of in the year of the reign of his present majesty

majesty *George* the second, king of *Great Britain*, &c. by the oath of twelve honest and lawful men of his bailiwick, by whom it is found, that the said *A. B.* hath sustained damages, occasioned by reason of the premisses, over and above his costs and charges by him about his suit in this behalf expended to *l.* and for those costs and charges to : Therefore it is adjudged, that the said *A.* do recover against the said *C.* his said damages found by the said inquisition; and also awarded to him with his consent by his majesty's said court, now here by way of increase for his extraordinary costs and charges by him laid out in this suit; which said damages, in the whole, amount to and the said *C.* in mercy, &c.

A writ of inquiry in trespass, where the defendants pleaded not guilty to part, and justified as to the residue; and judgment for the plaintiff on a demurrer.

GEORGE the second, &c. to the sheriff of greeting. Whereas *A. B.* lately in our court before us at *Westminster* by his bill without our writ impleaded *C. D.* and *E. F.* being in the custody of the marshal of our *Marshalsea*, before us; for that they, on the day of *March* in the year of our reign, with force and arms made an assault upon the said *A.* at *D.* in your county; and then and there beat, wounded, ill treated, took and imprisoned him, and there detained him in prison for a long time, (that is to say) for the space of twenty hours then next following, without any reasonable

reasonable or lawful cause, and against the laws and customs of this kingdom; and until the said *A.* paid a fine of five shillings and sixpence to procure his discharge; and then and there did other wrongs to him against our peace, and to the damage of the said *A.* 20*l.* as he declares; and therefore he brought his suit, &c. and such proceedings are had in our court before us, that the said *A.* ought to recover his damages against the said *C.* and *D.* occasioned by the said trespasss, assault, and imprisonment of the said *A.* and their detaining him by the space of half an hour, until the said *A.* had paid a fine of five shillings and sixpence to the said *C.* and *D.* but because it is unknown to our court before us, what damages the said *A.* hath sustained on that occasion; therefore we command you, that, by the oath of twelve honest and lawful men of your bailiwick, you diligently inquire what damages the said *A.* hath sustained, as well by the said trespasss, assault, and imprisonment of the said *A.* and detaining him for the space of half an hour, until the said *A.* paid them the said fine of five shillings and sixpence; as for his expences and costs laid out by him about his suit on that occasion, and the inquisition which you shall take thereon, &c. (as in the former).

A writ of inquiry of damages, after a sci' fa' against an administrator, where the defendant died before the return of the first writ of inquiry.

GEORGE the second, &c. to the sheriff of Middlesex, greeting. Whereas *A. B.* lately in our court before us at *Westminster* (that is to say), in *Michaelmas* term in the year of our reign, by bill without our writ, impleaded *C. D.* then being in the custody of the marshal of our *Marshalsea*, before us, for this cause (that is to say) that whereas the said *A.* and *C.* on the day of in the year of our Lord at *Westminster* in your county, accounted together between themselves (*here recite the declaration*); and such proceedings were had thereupon in our court before us at *Westminster*, that the said *A.* ought to recover his damages occasioned by the not performing the said several promises and undertakings; but because it was unknown to our court before us, what damages the said *A.* had sustained by reason of the premises, we commanded your predecessor, that, by the oaths of twelve honest and lawful men of your county, he should diligently inquire what damages the said *A.* had sustained, as well by reason of the not performing the said several promises and undertakings, as for his expences and costs by him about his suit in that behalf expended; and that the inquisition which he should take thereupon he should send to us at *Westminster*, on *Wednesday* next after, &c. under his seal, and the

the seals of those by whose oath he should take such inquisition, together with that writ; and the same day was given to the said *A.* to be before us at *Westminster* afore said, as by the record and proceedings thereof in our same court before us at *Westminster* may manifestly appear; and whereas on the behalf of the said *A.* it hath been shewn to us, that before the said *Wednesday* next after, &c. the said *C.* died intestate, and an inquisition of the said damages then remained to be taken, and that one *E. D.* widow and relict of the said *G.* was administratrix of all and singular the goods and chattels, rights and credits, which were of and belonged to the said *G. D.* her said late husband, who died intestate, as we have been informed by the said *A.* and because we were willing that those things which were right and just should be done in our court before us, to have a due execution thereof, we commanded you, that by honest and lawful men of your bailiwick, you should cause it to be known to the said *E.* that she was to be before us at *Westminster*, on *Saturday* next after, &c. to shew cause, if she knew of, or had any thing to say for herself, why damages ought not to be assessed for and recovered by the said *A.* according to the form and effect of the statute in such case made and provided, if it should seem expedient, &c. and further to do and receive those things that our said court there before us should consider of in that behalf, and that you should have there at the same time the names of those by whom you should so cause it to be known to her, and that same writ. At which day the said *A.* by his attorney, came before us at *Westminster*, and you, our sheriff of *Middlesex*,
O 2 made

made a return to us, that by honest and lawful men of your bailiwick, you had caused it to be known to the said *E.* that she was to appear before us at the day and place contained in the said writ, to have shewn cause, if she had or knew of any thing to say for herself, why the said damages ought not to have been assessed against her, and recovered by the said *A.* if it should seem expedient, &c. according to the tenor of the said writ; which said *E.* being so warned and solemnly required to be here at that day, likewise came by her attorney; whereupon the said *A.* prayed, that his said damages might be assessed and recovered by him in the said action; and because the said *E.* then said nothing, nor shewed or alleged any cause to hinder final judgment to be given in the said action, or why damages ought not to have been assessed in the said action; therefore at the request of the said *A.* we command you, that by the oath of twelve honest and lawful men of your bailiwick, you diligently inquire what damages the said *A.* hath sustained, as well occasioned by the premisses, as for his expences and costs laid out by him about his suit in that behalf; and the inquisition that you shall take thereon do you send to us at *Westminster*, on *Friday* next after, &c. under your seal, and the seals of them by whose oath you shall take such inquisition, together with this writ. Witness *Wm.* Lord *Mansfield* at *Westminster*, the day of in the year of our reign.

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Note;

Note; If the proceedings are by original, then the writ of inquiry is the same as in the Common Pleas, only instead of saying *was attached to appear in our court before our justices at Westminster*, you say, *was attached to appear in our court before us*; and when you come to the words, *and the inquisition which you shall take thereon*, you say thus, *you shall send to us on the morrow of All Souls* (instead of a day certain), *wherever we shall then be in England*.

GEORGE the second, &c. to E. F. G. H. *Subpoena on*
 &c. greeting. We command you, that *inquiry*.
 all and singular businesses and excuses being
 laid aside, you and every one of you be in
 your proper persons before our sheriff of *Middlesex*, on
 the day of
 at o'clock in the noon of the
 same day, at the court house at *Westminster-hall*, [if in vacation, or in an afternoon in term
 time, say, "at the *Three Tuns* in *Brook-street* near
 "*Holborn*"] in the county of *Middlesex*, to testify
 the truth in a certain matter of controversy,
 pending in our court before us at *Westminster*,
 between *A. B.* plaintiff, and *C. D.* defendant,
 on a plea of, &c. [as the action is.] And this
 you or any of you are by no means to omit,
 under the penalty upon each of you of 100 l.
 Witness, &c.

Note; You sign and seal this writ, and make
 out a note for the office, and tickets for the
 witnesses, as before directed in case of a trial,
 p.

NOTE relating to scire fieri inquiry.

Per Curiam: There must be the same notice of executing a *scire fieri* inquiry, as a common writ of inquiry. *M. 6 G. 1. Biron v. Philips, Str. 235. — Stead v. Lateward, M. 11 G. 1. S. P. ibid 623. Lord Raym. 1382.*

In regard the plaintiff may, immediately after he has signed his final judgment, sue out execution if he pleases, before he has completely entered the proceedings on the roll, I shall therefore in the next place proceed to title *Execution*,

Execution,

(a) This writ was given us by the statute of *Marlebridge*,

(b) This writ originally lay at common law, and was not given by the statute of *West. 2.* as some allege.

(c) This writ was given by the stat. *W. 2.* c. 18,

THE most usual writs of execution are either a *capias ad satisfaciendum* (a) against the body, a *feri facias* (b) against the goods and chattels, or an *elegit* (c) against all the goods and chattels, and a moiety of the defendant's lands. — These writs must each be written on a 2 s. stamp. — Neither *ca. fa.* nor *fi. fa.* to be signed. Sealing each 7 d. — An *elegit* is to be signed by Mr. *Heberden*; pay him 1 s. 8 d. Sealing 7 d.

NOTES.

1. Where there is an action on a bond with a *penalty*, and defendant suffers judgment to go against him by default, plaintiff may take out execution, and levy the whole penalty; and the defendant in such case has no remedy, save in equity,

equity, for this court, if moved, will not refer to the master to compute *principal, interest* and *costs*. But notwithstanding this, the *fairest* way is to levy no more than what is really due for principal, interest and costs; and in such case to indorse on the execution these words, "levy

" (the sum due for principal, interest and costs) besides poundage (a), and other necessary charges of levying;" and at the return of the writ, the sheriff will pay you the sum indorsed thereon clear of all deductions.

(a) Poundage not to be for executing judgments in corporations.

Comb. 217.
Cro. Car. 287.
See stat. 29
El. c. 4. s. 2.

2. There ought not to be two executions at the same time subsisting. But you may execute a *fi. fa.* and if the sheriff returns, that the defendant had no goods, or but so many, whereby he could not levy the whole debt or damages, the plaintiff may have another *fi. fa.* for the residue, or he may have an *elegit*, or he may have a *ca. fa.* but if he once takes the body, he can neither have a *fi. fa.* or *elegit*; for the body is deemed the greatest satisfaction, except the money recovered.

3 But if a *ca. fa.* be taken out, and the plaintiff has no effect of it, as if the sheriff return a *non est inventus*, though it is said in *Roll's Abr.* 904. that the plaintiff may not have another execution; the law is otherwise, as in *Hob.* 57. in the case of *Forster* and *Jackson*.

4. If on a *fieri facias* all the money is not levied, the writ must be returned before a second execution can be made out, because the second is grounded upon the deficiency of the first. *Salk.* 318.

5. If either of the parties die, execution cannot be taken out upon the judgment, till a *scire facias* sued out, and judgment thereupon obtained. *Stat.* 8 & 9 *W.* 3. c. 10.

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6. An execution was taken out against a man *in his life-time*, and executed on his goods after his death; and held to be good without a *scire facias*. *Vide Mod. Ca. in Law and Eq. 225.*

7. Before the act of the 29 Car. 2. the goods were bound at the *teste* of the writ; but by that statute they are bound only from the time of the delivery to the sheriff; but lands are bound from the day of the judgment.

8. It is a good return to a *feri facias* for the sheriff to say he has levied the goods, and that they remain in his hands for want of buyers; and if he continues in his office, you issue out a *venditioni exponas*, and if he does not do it, then a *distringas* directed to the coroners to distrain the sheriff to sell; for by that writ he is compellable to sell. If he is out of his office, you sue out a *distringas* to the new sheriff to distrain the old sheriff to sell, whereby he is compellable, under the penalty of forfeiting issues to the value of the goods. See 6 Mod. 295, 296.

9. It was said by Pollexfen, Ch. J. in the case of *Beaty and Samson*, 2 Ven. 95. that the sheriff cannot deliver the defendant's goods to the plaintiff in satisfaction, but they must be sold, and there needs no appraisement, as there must be upon an *elegit*.

It was held in the case of *Wilbrabam and Snow*, 2 Saunders 47. that the sheriff hath such a property in the goods taken in execution, that he may maintain an action of trespass or trover for them.

10. Where the sheriff upon a *feri facias* returns, that he had seized the goods of such a value, which was less than the debt, and that they were rescued, and that the defendant had

no other goods, the plaintiff cannot sue out an execution for any more than for the residue.
2 Saund. 344.

11. If a *ca. sa.* is executed, plaintiff cannot have another during defendant's life-time; and if lands are extended upon an *elegit*, plaintiff can never have another execution.

But if plaintiff takes out an *elegit*, and levies part of the debt upon the goods, and a *nichil* is returned as to the lands, he may sue out a *ca. sa.* and arrest the body of the defendant; for a *nichil* being returned as to the land, the *elegit* is but in nature of a common *fi. fa.* upon which if part be levied, the plaintiff may afterwards have a *ca. sa.* for the residue. The election is not compleat unless the plaintiff has some benefit from the land, for the taking out the writ is not an *actual election*, but only *in order to an election*; and if there be no lands there is nothing to chuse, and consequently no election. *Per Cur'*, M. 6 G. 1. *Beacon v. Peck*, 1 Str. 226.—*Vide Hob* 57, 58.

12. A writ of error is a *superfedeas* from the time of the allowance, but if the writ of execution is once executed, it must be returned. *Salk.* 322.

13. Where the sheriff suffers goods taken in execution, returned to be of such a value, to be rescued out of his hands, *scire facias* lies for the plaintiff to have execution against him, according to that value. 2 Saund. 344-5.

14. A *venditioni exponas* cannot be awarded, if it appears that the goods are out of the hands of the sheriff. 2 Saund. 344.

15. Where you sue out a new *feri facias*, or a *testatum*, you cannot do it till the former is filed

filed and returned, but you need not stay till the appearance day of the return for the *teste* of the new *feri facias*, but it may be tested on the return day of the first writ. *Jones* 200

16. If he who is plaintiff in an execution of lands releases one acre of the execution, all is extinct, because the execution is intire. *1 And.* 266.

17. On a *feri facias* upon a judgment against one partner, sheriff may take the goods of both, and the vendee shall have a moiety in common with the other. *Pope and Homan, Comb.* 217.

18. Upon a *feri facias* against an administrator, the sheriff may sell an estate for the life of another. *Comb.* 291.

19. If the sheriff has two *elegits* against the same person, at one and the same time, he may deliver a moiety of his land to one of them, and then to the other, he is to deliver a moiety of that which is left. *1 Cro.* 482.

20. Upon an *elegit*, the sheriff ought to deliver possession by *metes and bounds*, or otherwise the writ may be quashed. *1 Vent.* 259.

21. If two executions are delivered to the sheriff on the same day, he is bound to give preference to that which was first delivered; but if in fact he executes that which was last delivered, and makes a sale of the goods, the vendee hath a good title, and the party that sued out the first execution is intitled to an action against the sheriff. *Smallcombe v. Buckingham* and others, *Cartbaw* 420. *Salk.* 320.

22. Where judgment is had against two, and one dies before execution, the *scire facias* ought to be brought as well against the survivor, as against the heir and tertendants of the deceased; and

and *Holt* Ch. J. (as it is reported) said, as this was a *judicial writ* it might be framed upon the subject matter, and proposed the form to be thus; That the writ should be against the survivor, to shew cause why the plaintiff should not have execution against him *de bonis & cattallis*, and of the moiety of his lands, and against the heir and tertenants of the deceased, to shew cause why the plaintiff should not have execution of the moiety of the lands of the deceased, without mentioning the goods. *Pantan* and the tertenants of *Hall*, *Cartbew* 107.

23. A writ of error by two, and one dies pending the writ, an execution may be sued out without a *scire facias*. *Penrice* and *Brace*, *Mod. Ca. in Law and Equity* 108, 125.

24. It is said in the case of *Shaw* and *Cutters*, 1 *Cro.* 851. that where two are convicted, the taking of one, and his death, is no discharge of the other.

25. Upon fresh pursuit of a prisoner escaped, the sheriff may break open the house; and if he arrests the defendant looking out of the window, he may break open the door to take him. *Palmer* 53.

26. Where the sheriff permits the defendant to escape that is in execution, by the consent of the plaintiff, he shall never take him again. 1 *Show.* 174.

27. By an act of the 8th and 9th of king *William* the third, *cap.* 27. if a prisoner be in execution, any creditor, at whose suit he stands charged, may retake him by a new execution.

28. Before the *stat.* 21 *Jac.* 1. c. 24. if a man died in execution, his executors were no farther chargeable. *Hob.* 5, 6, 7, 8, 9. But now by that act, notwithstanding the party's dying in execution

execution, the plaintiff may have an execution against his lands, goods, and chattels.

29. A *fi. fa.* abates not by the plaintiff's death, but the sheriff must go on to execute his writ. *M. 3 Ann. Clerk and Withers, Salk. 322, 6 Mod. 290. 1 Mod. 188. — Mod. Ca. in L. & Eq. 225.*

A *fi. fa.* was taken out within the year, and a *nulla bona* returned; this is continued down for several years, and then a *ca. fa.* issued, sue out any *sci. fa.* and whether

30. If no execution be taken out within a year (a) after judgment, a *sci. fa.* to revive the judgment must be sued out, and directed into the county where the original action was brought. -- But if execution be sued out within the year, and returned and awarded on the roll, the same may be continued from term to term till execution executed, and plaintiff need not sue out any *sci. fa.* that be regular or no was the question; the court took time to inquire, and the last day of the term the Ch. J. said, if this were a new case they should think it hard to take away all *scire facias*'s; but the practice had gone so far, that there is no overturning it now. Cites 1 *Inst.* 290. 4 *Inst.* 271. *Mod. Ca.* 288. 1 *Sid.* 59. 1 *Keb.* 159. *Clift* 480. *Officina Brevium* 96. *Rastal* 164. Wherefore the execution held regular. T. 4 G. 1. *Aires v. Hardres,* 1 *Str.* 100. (a) The statute of Westminster, which is *infra annum*, must be computed by calendar months, and not by terms. *Per Cur.* *Str.* 301.

31. If a *cesset executio* were for a year after the judgment, yet plaintiff within the year and day after may take out execution without a *sci. fa.* But 2. if the *cesset executio* should not be entered on the roll.

There is a great difference between the case of a writ of error and an injunction, the former being a judicial pro-

32. If defendant brings error, and delays plaintiff for a year, and then is nonsuited, execution may be taken out without a *sci. fa.* But not in case of an injunction, for plaintiff might have taken out execution and continued it, by *vicecomes non misit breve.* *Salk.* 322. *Supersedeas quia*

quia improvide was awarded to the execution. *Vide Show. 402.*

33. Plaintiff brought two actions upon a promissory note, one against the *drawer*, and another against the *indorser*, and recovered in both. Defendants having tendered the *principal* in one, and the costs in both, *Cur'* ordered, that no execution should be taken out; and they said they would have laid plaintiff by the heels if he had taken out execution upon both. *E. 8 G.*

ceeding appearing upon record, whereas an injunction is not a matter of record, so as that the court can take notice of it. *Per Cur'* in *Winter v. Lightbound*, *E. 6 G. 1. Str. 301.*

1. *Windham v. Wisber and Trull*, 1 *Str.* 515.

34. *Cur'*, on motion, ordered the sheriff to levy and pay the landlord a year's rent in the case of an execution, without any deduction. *M. 12 G. 1. Gore v. Goston*, 1 *Str.* 643.

35. A ground landlord cannot come in for a year's rent on 8 *Ann. c. 14.* on an execution against an under lessee; for that statute extends only to the *immediate* landlord. *M. 1 G. 2. 2 Str.* 787.

36. If it be returned to an *elegit*, that there are no lands, the sheriff need not return an inquisition; for the use of that is only to deliver a moiety of the lands by, if there are any. *T. 4 G. 2. Stonehouse and Ewen*, 2 *Str.* 874.

37. If defendant omits to plead a *misnomer*, he may be taken in execution by the *wrong* name. *M. 18 G. 2. Crawford v. Satchwell*, *Str.* 1218. If a bond be given in a wrong name, the obligor must be sued by that name, and the execution must pursue it. *Ibid.*

A ca. fa. in debt.

(a) If there
be an *alias*
dict' insert it
here.

GEORGE the second, &c. to the sheriff of *Middlesex*, greeting. We command you, that you take C. D. (a) if he may be found in your bailiwick, and keep him safely, so that you may have his body before us at *Westminster*, on next after to satisfy A. B. of pounds of debt, which the said A. B. lately in our court before us recovered against him; as also which were adjudged to the said A. B. in our said court before us, for his damages which he sustained, as well by means of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. is convicted, as appears to us of record; and have you then there this writ. Witness, &c.

A ca. fa. in case.

IF in case upon promise you say, To satisfy A. B. of pounds, which the said A. B. lately in our court before us at *Westminster* recovered against the said C. D. for his damages, which he sustained as well by means of the not performing certain promises and undertakings lately made by the said C. D. to the said A. B. as for his costs and charges, &c. as in the other, *mutatis mutandis*.

If in trespass on the case generally, then say, occasioned as well by a certain trespass on the case committed against the said A. by him the said C. as also, &c.

If

If in trespass only, then say, occasioned by a certain trespass lately committed on the said *A.* by him the said *C.* as also, &c.

If in covenant, then say, occasioned as well by the breach of certain covenants lately made by the said *C.* to the said *A.*

If in ejectment, occasioned as well by a certain trespass and ejectment lately committed against the said *A.* by him the said *C.* as also, &c.

A testatum ca. fa.

If the declaration be laid in London, or any other county, and the cause tried there, and the defendant is not to be found there, then a *ca. fa.* is awarded to the sheriffs of London, &c. who return *non est inventus*; and thereupon this writ is made out, and directed to the sheriff of the county, where the defendant is to be found.

GEORGE the second, &c. to the sheriffs of London, greeting. Whereas we lately commanded our sheriff of *Middlesex*, that he should take *C. D.* if he might be found in his bailiwick, and safely keep him, so that he might have his body before us at *Westminster*, at a certain day now past, to satisfy *A. B.* of, &c. [as the sum and action is], whereof the said *C. D.* is convicted, as appears to us on record; and our said sheriff of *Middlesex* at that day returned to us, that the said *C. D.* was not found in his bailiwick; whereupon, on the behalf of the said *A. B.* it was sufficiently attested in our court before us, that the said *C. D.* doth lurk and secrete himself in your county; we therefore command you, that you take him if he may be found in your bailiwick, and keep him safely, so that you may have his body before us at *Westminster*, on next after to satisfy the said *A. B.* of the debt and damages [or damages] aforesaid; and have there then this writ. Witness, &c.

A ca. sa. after a fi. fa. on a recognizance after a judgment affirmed on a writ of error against two defendants, one of which was returned dead, for the residue of the money due, part having been levied by the bailiff of Westminster, by virtue of a fieri facias.

GEORGE the second, &c. to the sheriff of *Middlesex*, greeting. Whereas by our writ we lately commanded you, that of the lands and chattels of *W. P.* of the parish of *St. Margaret's, Westminster*, in your county, gentleman, in your bailiwick, you should cause to be made 100 *l.* and of the lands and chattels of *J. B.* of _____ in your county, gentleman, you should cause to be made 100 *l.* to render to *T. E.* according to the form and effect of an award of an execution upon a certain recognizance acknowledged by the said *W. P.* and *J. B.* to the said *J. F.* in our court before _____ knight, and his companions our justices of the bench at *Westminster*, as by the record and proceedings of the award of the said execution, which we caused to be brought into our court before us at *Westminster*, with certain causes of error, it appears to us of record; and also 12 *l.* which were awarded to the said *J. F.* in our same court before us, according to the form of the statute in that case made and provided, for his damages, expences, and costs, which he had sustained by occasion of the delay of the execution of the said judgment, by means of prosecuting our certain writ of correcting errors, sued out by
the

the said *W.* and *J. B.* of and concerning the premisses as aforesaid; whereof the said *W.* and *J. B.* are convicted, as likewise appears to us of record; and that you should have that money before us on the morrow of *All Souls*, wheresoever we should then be in *England*, to render to the said *J. F.* for the said debt, damages, expences, and costs; and you having at that day made a return to us, that, in order to have a due execution to be made of the said writ (to you directed) you had directed the bailiff of the liberty of the dean and chapter of the collegiate church of *St. Peter, Westminster*, who hath full execution of all warrants, writs, and mandates, within that liberty, to whom the said bailiff, (that is to say) *G. W.* esq; gave you this answer, that he had caused to be levied of the goods and chattels of the said *J. B.* 4*l.* 4*s.* parcel of the said debt and damages, which said money he had ready before us at the day and place aforesaid, to render to the said *J. F.* in part of the said debt and damages: And further you certified to us, that the said *J. B.* had no other or more goods or chattels in your bailiwick, whereof you was able to cause to be levied the residue of the said debt and damages, or any part thereof; and that the said *W.* is dead: Therefore we command you; that you take the said *J. B.* if he is to be found in your bailiwick, and safely keep him, so that you have his body before us on the octave of *St. Hilary*, wheresoever we shall then be in *England*, to make satisfaction to the said *J. F.* for 107*l.* 10*s.* residue of the said 112*l.* his said debt, damages, expences and costs; and have you there at the same time this writ. Witness,

*Returri man¹
dari balliv².*

A ca. fa. on a non pros.

TO make satisfaction to the said C. for pounds, according to the form of the statute in that case made and provided, awarded to the said C. in our court before us for his expences and costs in a certain action (of debt or trespass upon the case, as the nature of the action is) against the said C. at the suit of the said A. forasmuch as the said A. hath not prosecuted his said action; and have you there at the same time this writ. Witness, &c.

Lee and Antonie.

Ca. fa. for costs against the plaintiff after a verdict.

TO make satisfaction to C. D. for awarded to the said C. according to the form of the statute in that case made and provided, for his expences and costs laid out by him in making his defence in a certain action of debt against the said C. at the suit of the said A. and have you then there this writ. Witness, &c.

For an administrator.

TO make satisfaction to A. B. gent. administrator of all and singular the goods and chattels, rights and credits, which lately were of and belonging to C. D. esq; deceased, who died intestate, for a debt of pounds; and also (the costs allowed) for his damages, which

which he sustained, as well occasioned by the detaining of the said debt, as for his expences and costs laid out by him in prosecuting the said suit, and whereof the said C. is convicted, as appears to us of record; wherefore it is adjudged in our same court before us, that the said A. have this execution thereof; and have you there this writ. Witness, &c.

Ca. fa. upon a judgment affirmed after a writ of error upon a judgment, in the time of king George the first.

GEORGE the second, &c. to the sheriff of greeting. We command you, that you take late of in your county, gentleman, otherwise called, &c. if he shall be found in your bailiwick, and him safely keep, so that you have his body before us at *Westminster*, &c. (naming the return, which must be general, as on the octave of *St. Hilary*), wheresoever we shall then be in *England*, to make satisfaction to for a debt of pounds, which the said in the court of our late beloved father *George* late king of *Great Britain*, &c. before *Sir Robert Eyre* knight, and his companions justices of the court of Common Bench at *Westminster*, recovered against him; and also for pounds for his damages which he sustained, as well by reason of the detaining of the said debt, as for his expences and costs laid out by him about his suit in that behalf, whereof the said is convicted, as by the inspection of the record, and proceedings thereof (which in the same court of the said

P 2

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late king, before the said late king himself, the said late king caused to be brought before him with certain causes of error; and which in the same court of our said late predecessor, before the said late king himself, is in all things affirmed), it appears to us of record now remaining before us; and also for pounds, which were awarded to the said in the said court of the said late king, before the said late king himself, according to the form of the statute in that case made and provided, for damages, expences and costs, which the said had sustained by reason of the delay of the execution of the said judgment, by means of the said his prosecuting the said writ of the same late king, for correcting errors sued out of and upon the premisses as aforesaid, whereof the said is likewise convicted, as also appears to us of record; and have you there then this writ. Witness, &c,

3 H. 7. c. 10.
13 Car. 2.
c. 2. s. 10.

Lee and Antonie.

Ca. sa. on a judgment on scire facias, wherefore execution ought not, &c. after a non pros. upon a writ of error.

GEORGE the second, &c. to the sheriffs of London, greeting. We command you, that you take late of London, widow, if she shall be found in your bailiwick, and safely keep her, so that you have her body before us at Westminster on the morrow of All Souls, (a) wheresoever we shall then be in England, to make satisfaction to for pounds and shillings, which were awarded to the said in our court before us,

(a) The return.

us, according to the form of the statute in such ^{3 H. 7. c. 10.}
 case made and provided, for her damages, ex- ^{13 Car. 2.}
 pences and costs, which she sustained by reason ^{c. 10. s. 10.}
 of the delay of the execution of a certain judg-
 ment lately obtained for pounds, by the
 said against the said in our
 court of Common Bench, before knight,
 and his companions our justices of the said
 Common Bench at *Westminster*, as by the record
 and proceedings of the said judgment (which
 we lately caused to be brought into our said
 court before us with certain causes of error),
 now remaining in our court before us manifestly
 appears to us of record; and for that the said
 afterwards in our court before us did
 not prosecute her said writ, as also appeareth to
 us of record; and that you have there at the
 same time this writ. Witnesses, &c.

*A capias ad satisfaciendum for an admini-
 stratrix for the residue in case, with a re-
 cital of a fieri facias in London, and
 another in Middlesex, and the sheriff's of
 Middlesex's warrant to the bailiff of the
 liberty of Westminster, who levied part,
 notwithstanding writs of error and super-
 sedas.*

GEORGE the second, &c. to the sheriffs of
 London, greeting. Whereas by our writ
 we lately commanded you, that you should
 cause to be levied of the goods and chattels of
 esq; in your bailiwick pounds.
 which widow, administratrix of all and
 singular the goods and chattels, rights and
 credits,

credits, which were of her late husband deceased, lately in our court before us at *Westminster* recovered against him for her damages which she sustained, occasioned as well by not performing several promises and undertakings lately made by the said to the same as administratrix of the said as also for her expences and costs laid out by her about her suit in that behalf, whereof the said is convicted as appeareth to us of record; and that you should have that money before us at a certain day now past, to render to the said for her damages, expences and costs, notwithstanding our writ of error, and our writ of *superfedeas* thereupon issued; and you at that day thereupon made a return to us, that the said had no goods or chattels in your bailiwick, whereby you were able to levy the said damages, expences and costs, or any part thereof; whereupon on the behalf of the said it was sufficiently testified before us in our court at *Westminster*, that the said had sufficient goods and chattels in our county of *Middlesex*, whereby the sheriff of the said county might cause to be levied the said damages, expences and costs; wherefore we commanded the said sheriff of *Middlesex*, that he should cause to be levied of the goods and chattels of the said in his bailiwick pounds, for her said damages, expences and costs; and that he should have there that money before us at *Westminster*, on, &c. (the return), to render to the said for her said damages, expences and costs, notwithstanding our said writ of error, and our writ of *superfedeas*, issued as above; and our said sheriff of *Middlesex*

desex at that day made a return to us, that, for the execution to be made of the said writ to him directed, he had directed the bailiff of the liberty of the dean and chapter of the collegiate church of *St. Peter, Westminster*, (who hath full execution of all warrants, writs and mandates, within that liberty), to whom the said bailiff, (that is to say) *esq;* gave him this answer, that he had caused to be levied of the goods and chattels of the said *_____* pounds, parcel of the said debt and damages; which said money he had ready before us at the day and place aforesaid, to render to the said *_____* in part of her said debt and damages; and he further certified to us, that the said *_____* had no other or more goods or chattels in his bailiwick, whereof he was able to cause to be levied the residue of the said debt and damages, or any part thereof; therefore we command you, that you take the said *_____* if he shall be found in your bailiwick, and safely keep him, so that ye have his body before us at *Westminster*, on *Monday* next, &c. (the return) to make satisfaction to the said *_____* for *_____* pounds, residue of the said *_____* pounds, for the damages aforesaid; and have you then there this writ. Witness, &c.

Lee and Antonie.

*A testatum capias ad satisfaciendum at the
suit of husband and wife, upon a judg-
ment recovered by her as executrix, upon a
promise made to her former husband, re-
vived by her and her second husband by
scire facias.*

GEORGE the second, &c. to the Sheriff of
Middlesex, greeting. Whereas *Elizabeth
Grove*, widow, executrix of the last will and
testament of *John Grove* her late husband de-
ceased, in the court of our dearly beloved fa-
ther *George* late king of *Great Britain*, before
the said late king himself at *Westminster*, by the
judgment of the same court, recovered against
A. B. pounds for her damages, which
she had sustained, occasioned as well by not
performing certain promises and undertakings
made to the said *John* in his life-time by the
said *A.* as also for her expences and costs laid out
by her the said *Elizabeth* about her suit in this
behalf, whereof the said *A.* is convicted, as it
appeareth to us of record; and the said *Eliza-
beth*, after this court's giving the said judgment,
took to husband one *William Reeves*, and had
taken out no execution on the said judgment;
therefore in our court before us at *Westminster* it
was considered, that the said *William* and *Eliza-
beth* might have their execution against the
said *A.* for the damages aforesaid, according to
the force, form and effect, of the said Recovery,
as likewise appeareth to us of record; and we
thereupon by our writ lately commanded the
sheriffs of *London*, that they should take the
aforesaid

aforesaid *A.* if he could have been found in their bailiwick, and safely to have kept him, so that they might have had his body before us at *Westminster*, at a certain day mentioned in the same writ, to satisfy to the said *William* and *Elizabeth* for the damages aforesaid; and our said sheriffs of *London* at that day returned to us, that the said *A.* was not to be found in their bailiwick; upon which, on the behalf of the said *William* and *Elizabeth*, it is sufficiently testified in our court before us, that the said *A.* lurks and wanders up and down in your county; therefore we command you, that you take him, if he shall be found in your bailiwick, and safely keep him, so that you may have his body before us at *Westminster*, on *Thursday* next, &c. to make satisfaction to the said *William* and *Elizabeth* for the damages aforesaid; and have you then there this writ. Witness, &c.

A. fi. fa. in case on promise.

GEORGE the second, &c. to the sheriff of greeting. We command you, that, of the goods and chattels of *C. D.* in your bailiwick, you cause to be made pounds, which *A. B.* lately in our court before us at *Westminster*, recovered against the said *C. D.* for his damages which he sustained, as well by means of the not performing certain promises and undertakings lately made by the said *C. D.* to the said *A. B.* as for his costs and charges by him about his suit in that behalf expended; whereof the said *C. D.* is convicted, as appears to us of record; and that you have that money before us at *Westminster* on next after

(a) The whole demand in case consists of damages. to render to the said *A. B.* for his damages (a) *aforesaid*; and that you have there then this writ. Witness, &c.

If in covenant, say, "which he sustained as well by means of the breaking a certain covenant lately made between the said *C.* and the said *A.* as for his costs and charges, &c."

If you make out a *ca. fa.* or a *fi. fa.* after a *sci. fa.* has issued, after the words "as it appears to us of record," add, "and whereupon in our said court before us it was considered, that the said *A. B.* might have his execution against the said *C. D.* of the damages *aforesaid* [or debt and damages, as the action is]; and that you have, &c."

A fieri facias in debt.

(a) If on a bond, you add, *otherwise called*, &c. as in the bond.

GEORGE the second, &c. to the sheriff of *Middlesex*, greeting. We command you, that you cause to be made of the goods and chattels of *C. D.* (a) pounds, which *A. B.* lately in our court before us at *Westminster* recovered against him for a debt; and also pounds, which were awarded to the said *A. B.* in our same court before us for his damages which he sustained, occasioned as well by detaining of his said debt, as for his expences and costs laid out by him about his suit in that behalf, whereof the said *C.* is convicted, as appears to us of record; and have you the said monies before us at *Westminster* on *Monday* next, &c. to render to the said *A.* for his debt and damages *aforesaid*; and have you there at the same time this writ. Witness, &c.

If the proceedings are by original, then say,

AND have you the money before us on the morrow of *All Souls* (a), where (a) The re-
foever we shall then be in *England*, to render turn.
&c.

If in case upon promise, then say,

pounds, which *A.* hath lately reco-
vered against him in our court before us at
Westminster for his damages which he sustained,
occasioned as well by the not performing certain
promises and undertakings, [or a certain promise
and undertaking *as the case is*], lately made by
the said *C.* to the said *A.* as for his expences,
costs, &c. *as before.*

If in covenant,

FOR his damages which he sustained, as well
by reason of breaking of a certain covenant,
[or certain covenants *as the case is*], lately made
between the said *C.* and the said *A.* as also for
his expences and costs, &c.

In ejectment,

FOR his damages which he sustained by
reason of a certain trespass and ejectment,
[or certain trespasses and ejectments *as the case*
is], committed against the said *A.* by the said *C.*
with force and arms, and against our peace, at
E. in your county.

In

In trespass.

BY reason of a certain trespass committed against the said C. with force and arms, and against our peace, at E. in your county.

If against an administrator.

THAT you cause to be made pounds of the goods and chattels, which were of deceased, at the time of his death in the hands and custody of administrator of all and singular the goods and chattels, rights and credits, which were of the said at the time of his death, who died intestate, being in your bailiwick; which A. B. lately in our court (*as before to the words*, whereof he is convicted, as appears to us of record), if he should have so much in his hands, and if he should not have so much in his hands, then the damages aforesaid (*if it be in debt*).

If in case, then say, the said expences and costs (*because the whole demand in case consists of damages*), of the proper goods and chattels of the said (the administrator); and have you the money, &c. *as before*.

If against an executor.

THAT you cause to be made of the goods and chattels, which were of the said deceased, at the time of his death, in the hands of executor of the last will and testament of the said in your bailiwick, &c. *as before*.

If

If against the plaintiff for costs awarded to the defendant.

THAT you cause to be made ^{pounds} of the goods and chattels of *A. B.* in your bailiwick, which were by this court awarded, according to the form of the statute in such case made and provided, to *C. D.* for his expences and costs in his defence in a certain action of trespass, at the suit of the said *A.* and have you the money before us at *Westminster*, on *Monday* next, &c. to render to the said *C.* for his expences and costs aforesaid; and have you there at the same time this writ. Witness, &c.

A testatum fieri facias in debt.

GEORGE the second, &c. to the sheriff of greeting. Whereas we lately commanded our sheriff of *Middlesex*, that he should cause to be made of the goods and chattels of *C. D.* in his bailiwick ^{pounds}, and ^{shillings}, which *A. B.* lately in our court before us at *Westminster*, recovered against him for debt; and also ^{pounds}, and ^{shillings}, which lately in our same court before us were awarded to him for his damages which he sustained, occasioned as well by the detaining of his said debt, as for his expences and costs laid out by him about his suit in that behalf, whereof the said *C.* is convicted, as appears to us of record; and that he should have the money before us at *Westminster*, on *Monday* next after the morrow of *All Souls* now last.

last past, to render to the said *A.* for the debt and damages aforesaid; and our said sheriff of *Middlesex* made a return to us at that day, that the said *C.* had not any goods or chattels in his bailiwick, whereof he could cause to be levied the said monies; whereupon on the behalf of the said *A.* it is sufficiently testified in our court before us, that the said *C.* hath goods and chattels sufficient in your bailiwick, whereof you may cause to be levied the said monies; therefore we command you, that you cause to be levied the said pounds, and shillings, of the goods and chattels of the said *C.* in your bailiwick, for the said debt, &c. as in a *fi. fa.*

A fi. fa. against bail.

GEORGE the second, &c. to the sheriff of *Middlesex*, greeting. We command you, that of the goods and chattels of *A. B.* and *C. D.* (*manucaptors*) for *E. F.* in your bailiwick you cause to be made pounds, for a debt which *G. H.* lately in our court before us at *Westminster* recovered against the said *E. F.* and also shillings, which in our same court were awarded to the said *G. H.* for his damages which he sustained, as well by reason of detaining his said debt, as for his expences and costs laid out by him about his suit in this behalf, whereof the said *E. F.* is convicted, as appears to us of record; and whereupon it was adjudged in our same court before us at *Westminster*, that the said *G. H.* might have an execution against the said *A. B.* and *C. D.* for the said debt and damages, according to the force, form and effect of a certain recognizance acknowledged by them the

faid

saïd *A. B.* and *C. D.* in our saïd court before us, for the saïd *E. F.* at the suit of the saïd *G. H.* as likewise appears to us of record; and have you the monies before us at *Westminster* on Monday next, &c. (the return), to render to the saïd *G. H.* for his debt and damages aforesaid; and have you there at the same time this writ. Witness, &c.

Lee and Antonie.

A fieri facias on a judgment on a recognizance of bail in the Common Bench, after an affirmance of the same on a writ of error in the King's Bench.

GEORGE the second, &c. to the sheriff of *Middlesex*, greeting. We command you, that of the goods ^(a) and chattels of *A. B.* of the parish of *St. Margaret's, Westminster*, in your county, gentleman, being in your bailiwick, and of the goods ^(b) and chattels of *C. D.* in *Grange Court, Lincoln's-inn-fields*, in your county, gentleman, in your bailiwick, you cause to be made pounds, to be rendered to *J. T.* according to the form and effect of the award of an execution upon a certain recognizance acknowledged by the saïd *A. B.* and *C. D.* to the saïd *J. T.* in our court before knight, (the chief justice), and his companions our justices of the Common Bench at *Westminster*, as by the record and proceedings of the award of the execution thereof (which we caused to be brought into our court before us at *Westminster*, with certain causes for correcting errors in the same) it appeareth to us of record, and which in our court before us is now in all things affirmed, as likewise appeareth to

^(a) In *Lilly's* Ent. 582. it is lands.
^(b) Lands, wide *Lilly's* Ent. 582.

The present Practice of the

us of record; and also pounds which were awarded to the said *J. T.* in our same court, according to the form of the statute in that case made and provided for his expences and costs; which he sustained by reason of the delay of the execution of the judgment aforesaid; by means of prosecuting our said writ for correcting errors sued out as aforesaid by the said *A. B.* and *C. D.* at and upon the premisses whereof the same *A. B.* and *C. D.* are convicted, as likewise appears to us of record; and have you the monies before us in three weeks from the day of the *Holy Trinity*, wheresoever we shall then be in *England*, to be rendered to the said *J.* for his said debt; damages; expences and costs; and have you there likewise at the same time this writ. Witness, &c.

A fieri facias for triple damages of tithes

GEORGE the second, &c. to the Sheriff of greeting. We command you, that of the goods and chattels of late of in your county, malster, in your bailiwick, you cause to be levied pounds; which were awarded in our court before us at *Westminster*, to clerk, for the triple value of certain tithes of grain springing, growing and renewing, from certain lands in in your county, taken and carried away by the said contrary to the form of the statute in that case made and provided; and have you those monies before us at *Westminster* on *Friday*, &c. (naming the return), to render to the said *Charles* the said pounds, whereof the said *James* is convicted, as appears to us of record; and

and have you then there this writ. Witness,

A fieri facias de bonis ecclesiasticis.

GEORGE, &c. to the reverend father in Christ *Thomas* lord bishop of *Lincoln*, greeting. We command you, that of the ecclesiastical goods of *C. D.* (otherwise called *C. D.* master of arts, rector of the rectory of *otherwise*) (a) in your diocese, you cause (a) As in the to be levied *pounds of debt which bond.* *A. B.* lately recovered in our court and of our late queen, before us and our late queen at *Westminster*, against him; and also *pounds, which to the same A. in our same court before us and our said late queen at Westminster* afore said, were adjudged for his damages which he sustained, occasioned as well by detaining his said debt, as for his expences and costs laid out by him about his suit in this behalf, whereof the said *C.* is convicted, as it appears to us of record; and have you that money before us at *Westminster* on *Wednesday*, &c. (naming the return), to render to the said *A.* for his said debt and damages; and forasmuch as our sheriffs of *London* have returned to us at *Westminster* on *Monday*, &c. last past, that the said *C. D.* is a beneficed clerk in your diocese, having neither any goods or chattels or lay-fee in their bailiwick, whereof the said debt and damages, or any part thereof, could in any-wise be made and levied; and have you there at the same time this mandate. Witness, &c.

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A fieri facias in debt upon a bond for an administrator after a scire facias, upon a judgment of the court of Common Pleas affirmed upon a writ of error in the King's Bench, in the life of the intestate.

GEORGE the second, &c. to the sheriffs of London, greeting. We command you, that you cause to be made of the goods and chattels of *S. F.* late of London, merchant, otherwise called, &c. (as he is mentioned in the bond) in your bailiwick *xx* pounds, for a debt which *G. P.* now deceased, in his life-time, late in our court before *xx* knight, and his companions our justices of our court of Common Bench at *Westminster*, by our writ, and by the judgment of the same court, recovered against him, and also *xx* pounds and *xx* shillings, awarded to the said *G. P.* with his consent, by our said court of Common Bench, for his damages, which he sustained by reason of detaining the said debt, whereof the said *S.* is convicted, as by the inspection of the record and proceedings thereof (which we caused to be brought into our court before us at *Westminster*, by virtue of our writ for correcting errors sued out by the said *S.* of and upon the premisses, and which in our court before us is in all things affirmed), it appeareth to us of record; as also *xx* pounds and *xx* shillings, which in our same court before us at *Westminster*, according to the form of the statute in that case made and provided, were awarded to the said *G.* for his damages, expences and costs, which he sustained by reason of the delay of the said execution,

execution, by means of prosecuting our said writ of error sued out as aforesaid by the said *Simon*, of and upon the premisses, and whereof the said *Simon* is convicted, as appears to us of record; and whereas the said *G. P.* afterwards (that is to say), on the day of in the year of our reign, died intestate, not having had any satisfaction for his said debt, damages, expences and costs, or any part thereof, after whose death (that is to say), on the day of in the said year of our reign at *London* aforesaid, administration of all and singular the goods and chattels, rights and credits, which were of and belonged to the said *G. P.* at the time of his death, by *Thomas* by divine providence lord archbishop of *Canterbury*, primate and metropolitan of all *England* (to whom the commission of the said administration aforesaid of right belonged), was committed to *E. P.* widow and relict of the said *G. P.* in due form of law; and wherefore in our same court before us it is adjudged, that the said *E.* may have execution against the said *S.* for the debt, damages, expences and costs aforesaid, as also for pounds for her expences and costs, by our court before us at *Westminster*, according to the form of the statute in that case made and 8 & 9 W. 3. provided, awarded to the said *E.* whereof the c. 10. s. 3. said *S.* is convicted, as it appears likewise to us of record; and that you have that money before us at *Westminster* in fifteen days from the day of the *Holy Trinity*, wheresoever we shall then be in *England*, to render to the said *E.* for the debt, and the said several damages, expences and costs; and have you there at the same time this writ. Witness, &c.

A fieri facias where judgment in the Common Pleas was affirmed in the King's Bench, and the plaintiff in the action died, and his administrator revived it by scire facias, and had judgment.

GEORGE the second, &c. to the sheriff of Middlesex, greeting. We command you, that of the goods and chattels of *W. S.* late of, &c. in your bailiwick, you cause to be made pounds, for a debt which *T. A.* lately deceased, in his life-time, before knight, and his brethren our justices of the Common Bench at *Westminster*, recovered against him; and also pounds awarded to the said *T. A.* with his consent, by our said court of Common Bench, for his damages, which he sustained by reason of detaining that debt, whereof the said *T. S.* is convicted, as by the inspection of the record and proceedings thereon (which by virtue of our writ for correcting errors, sued out by the said *W. S.* we caused to be brought into our court before us at *Westminster*, with certain causes of error), it appears to us of record; as also pounds, which in our court before us at *Westminster*, according to the form of the statute in that case made and provided, were awarded to the said *Thomas* for his damages, expences and costs, which he sustained by reason of the delay of the execution of the said judgment, by means of prosecuting our said writ for correcting errors, sued out as aforesaid by the said *W. S.* against the said *T. A.* of and upon the premisses, upon which said writ of error the judgment against the said *W. S.* is in

in all things affirmed, as likewise appears to us of record; and thereupon it was considered in our same court before us at *Westminster*, that widow, relict and administratrix of all and singular the goods and chattels, rights and credits, which were of and belonging to the said *T. A.* at the time of his death, may have execution against the said *W. S.* for the said debt, and the said several damages, expences and costs; and have you the said monies before us at *Westminster*, in *&c.* [the return], wheresoever we shall then be in *England*, to render to the said for her said debt, damages, expences and costs; and have you there likewise at the same time this writ. Witness, *&c.*

A testatum non omittas fieri facias in debt, after a judgment in C. B. affirmed on a writ of error in the King's Bench.

GEORGE the second, *&c.* to the sheriff of *Berks*, greeting. Whereas we lately commanded our sheriffs of *London*, that of the goods and chattels of late of *Windsor*, in your county of in their bailiwick, they should cause to be made pounds, which widow, lately in our court before knight, and his brethren our justices of the Common Bench at *Westminster*, recovered against him for her damages, which she sustained as well by reason of his not performing a certain promise and undertaking lately made by the said to the said as also for her expences and costs laid out by her about her suit in that behalf, whereof the said was convicted, as by the

3 H. 7. c. 10.

the inspection of the record and proceedings thereupon (which we lately caused to be brought into our court before us at *Westminster*, with certain causes of error, and which in our same court before us is in all things affirmed), now remaining in our court before us, it appears to us of record; and also pounds, which were awarded to the said in our same court before us, according to the form of the statute in that case made and provided, for her damages, expences and costs, which she sustained by reason of the delay of the execution of the said judgment, by means of prosecuting our said writ for correcting errors, sued out by the said afore said, of and upon the premisses, whereof the said is convicted, as appears to us likewise of record; and that they should have those monies before us in fifteen days from the day of *St. Martin* now last past, wheresoever we should then be in *England*, to render to the said for her said damages, expences and costs; and our said sheriffs of *London* at that day returned to us, that the within named had no goods or chattels in their bailiwick, whereof the within written damages, expences and costs, or any part thereof, could be made or levied; whereupon on the behalf of the said it is sufficiently testified in our same court before us, that the said hath sufficient goods and chattels in your bailiwick, whereof the said damages, expences and costs, may be caused to be made and levied; wherefore we command you, that you do not omit by reason of any liberty within your county, but that you enter therein, and of the goods and chattels of the said in your bailiwick, you cause to be made

pounds

pounds and shillings, for the said damages, expences and costs; and have you those monies before us on the octave of *St. Hilary*, wheresoever we shall then be in *England*, to be rendered to the said for her said damages, expences and costs; and have you also there at the same time this writ. Witness, &c.

A fieri facias for restitution, on the reversal of a judgment on a writ of error.

GEORGE, &c. to the sheriff of greeting. Whereas *A. B.* lately in our court (that is to say), in the term of in the year of our reign, before knight, and his brethren our justices of the Common Bench at *Westminster*, by our writ, and by the judgment of the same court, recovered against *C. D.* late of, &c. and *M.* his wife, *E. F.* late of, &c. *G. H.* late of, &c. pounds, which in our said court of Common Bench at *Westminster* were awarded to the said *A.* for his damages, which he had sustained by reason of certain trespasses committed against the said *A.* by the said *C. M. E.* and *G.* with force and arms against our peace at aforesaid, whereof they are convicted, as by the inspection of the record and proceedings thereof (which we lately caused to be brought into our court before us at *Westminster*, with certain causes for correcting errors in the same), it appears to us of record: And whereas we, by reason of divers errors in the said record and proceedings aforesaid, and also in giving the said judgment, have reversed and totally annulled the judgment aforesaid, It is considered

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in our same court before us at *Westminster* afore-
 said, that the said *C. M. E.* and *G.* be restored to
 all things which they have parted with by rea-
 son of the said judgment; and for that the said
A. sued out his execution upon the said judg-
 ment, and they the said *C. M. E.* and *G.* were
 thereupon taken in execution for the same, and
 detained in prison, until payment was made
 unto the said *A.* of the said pounds:
 Therefore we command you, that of the goods
 and chattels of the said *A.* in your bailiwick,
 you cause to be made the said pounds;
 and have you those monies before us at *West-*
minster, &c. (the day of the return), to restore to
 the said *C. M. E.* and *G.* the said pounds,
 awarded to them by our said court as afore-
 said, upon the reversal of the said judgment; and
 have you there at the same time this writ,
 Witness, &c.

An elegit.

GEORGE the second, &c. Whereas *A. B.*
 lately in our court before us at *Westminster*,
 by bill without our writ, and by the judgment
 of the same court, recovered against *C. D.*
 pounds of debt, and also 40*s.* for
 his damages, which he sustained as well by
 means of the detaining the said debt, as for his
 costs and charges by him about his suit in that
 behalf expended; wherefore the said *C. D.* was
 convicted, as appears to us of record; and af-
 terwards the said *A. B.* came in our court before
 us, and chose (*a*) all the goods and chattels of
 the said *C. D.* except the oxen and beasts of his
 plough, and also a moiety of all and singular
 the

the lands and tenements of the said C. D. in your bailiwick, to be delivered according to the form of the statute in that case made and provided, and until the said debt and damages should be thereupon fully levied: We therefore command you, that all the goods and chattels of the said C. D. in your bailiwick, except the oxen and beasts of his plough, and also a moiety of all the lands and tenements of the said C. D. in your bailiwick; whereof the said C. D. on the day of on which day the said judgment was given, or ever afterwards, was seized, you cause to be delivered without delay to the said A. B. by a reasonable price and extent, to hold the said goods and chattels as his proper goods and chattels; and also to hold the moiety of the said lands and tenements as his free tenement to him and his assigns, according to the form of the said statute, until the said debt and damages shall be thereof fully levied; and that you make appear to us at *Westminster*, on next after under the seal and seals of them by whose oath you shall make the said extent and appraisement, in what manner you shall have executed this our writ; and that you have there then this writ. Witness, &c.

Lee and Antonie.

Indorse the attorney's name.

Indorse the attorney's name. Be it remembered, that in the term of the last pass, before our lord the king, at Westminster, came A. B. by K. S. his attorney, and brought into the court of our said lord the king, then there his bill against C. D. being in the custody of the marshal of the said court.

All issues and judgments ought to be entered on the roll in a full fair hand,

with a large margin of an

inch at least, and a convenient distance at the top [*i. e.* about nine inches the breadth of the roll], for binding up the same; and at the bottom [*i. e.* about an inch and an half], that the writing be not rubbed. *Rule Hil. 1657.* Every judgment, or an *incipitur* thereof, to be entered on the roll before such judgment be signed. *Rule M. 5 Ann.* — *Note*; you may enter your issues on both sides the roll; and when you have occasion to do so, you begin over against the first line of your *memorandum*, leaving at least an inch margin.

Of entering issues and judgments on the roll.

The entry on the roll begins thus:

As yet of Hilary term. Witness Sir knight [naming the chief justice (a).]

(a) Witness, &c. may be omitted.

(b) *Note*;
By *Rule E.*
4 *Jac. 2.*
warrants of
attorney for
plaintiff and
defendant

ought to be entered on every judgment roll before the entry of the judgment, otherwise such roll not to be filed.

Middlesex, A. B. puts in his place *R. S.* his attorney, against *C. D.* in a plea of trespass on the case (b), according as the action is; and if the defendant be described by an *alias dicit* in the declaration, or he or the plaintiff be an executor or administrator, they must be so mentioned in the warrant.

Middlesex, C. D. puts in his place *B. R.* his attorney, at the suit of the said *A. B.* in the plea aforesaid.

This entry is where the declaration is of one term, and the issue is of another.

Middlesex, Be it remembered, that in the term of, &c. last past, before our lord the king at *Westminster*, came *A. B.* by *R. S.* his attorney, and brought into the court of our said lord the king then there his bill against *C. D.* being in the custody of the marshal of the *Marshalsea*

Shal sea of our said lord the king before the king himself, of a plea of trespass upon the case [trespass and assault, or debt, as the action is]; and there are pledges of prosecuting, to wit, *John Doe* and *Richard Roe*; which bill follows in these words, to wit, *London*, to wit, *A. B.* complains of *C. D.* being in custody of, &c. [So set forth the declaration in *hæc verba*]; leaving out the pledges to prosecute, because they are named before.

Then on a new line you write the imparlance thus:

And now at this day (that is to say), on next after, &c. [the first day of the term the issue is of], in this same term, until which day the said *C. D.* had licence to imparle to the said bill, and then to answer, &c. came before our lord the king at *Westminster*, as well the said *A. B.* by his attorney aforesaid, as the said *C. D.* by *B. R.* his attorney; and the said *C. D.* defends the force and injury, when, &c. and says, that [here insert the plea]; and of this he puts himself upon the country, and the said *A. B.* does the like: Therefore let a jury thereupon come before our lord the king at *Westminster*, on next after [some day in the term the issue is of, and before the day of trial], who are in no-wise a-kin either to the said *A. B.* or the said *C. D.* to take cognizance, upon their oath, of the whole truth of the premisses, because as well the said *C. D.* as the said *A. B.* have put themselves upon that jury. The same day is given to the parties aforesaid, at the same place.

Want of a
similiter not
aided or
amendable.
M. 12 G. 1.
Str. 641.

Middlesex,

Memorandum,
where the de-
claration and
issue are of
the same term.

Middlesex, to wit, Be it remembered, that on
next after, &c. [the first day of the term],
in this same term, before our lord the king at
Westminster, came *A. B.* by *R. A.* his attorney,
and brought into the court of our said lord the
king then there his certain bill against *C. D.*
being in the custody [as in the other prece-
dent.]

No imparlance, but after your declaration
you enter the plea on a new line, thus:

And the said *C. D.* by *B. R.* his attorney,
comes and defends the force and injury, when,
&c. and says, &c. as before.

If it be a judgment on a verdict, you enter to
the end of the issue; and then go on thus on a
new line.

Afterwards the process being continued be-
tween the parties aforesaid of the plea afore-
said, by the jury being respited between them
before our lord the king at *Westminster*, until
next after [the return of the

(a) If at the
assizes, say,
unless the
justices of our
lord the king,
assigned to
keep the as-
sises in the
county afore-
said, shall first
come.

(b) If at the
assizes, the
place they are
held at.

(c) The said justices of our lord the king.

distringas] (a) then next following, unless the
king's right trusty and well beloved Sir
knight, his chief justice, assigned to hold pleas
before the king himself, shall first come on
the day of at the
Guildhall (b) of the city of *London*, according
to the form of the statute in such case made
and provided, for default of the jurors, because
none of them did appear; at which day before
the lord the king at *Westminster* the aforesaid
A. B. comes by the said *R. S.* his attorney afore-
said; and the said chief justice (c), before

whom

whom the said issue was tried, sent hither his
(a) record had in these words:

Afterwards, that is to say, on the day and
at the place within contained, before Sir
knight, (b) the chief justice, within written

gentleman, being associated unto the said
chief justice by force of the statute in that case
made and provided, came the within named *A. B.*
by his attorney within contained, and the within
named *C. D.* although solemnly required came
not, but made default: Therefore let the jurors
of the jury within mentioned be taken against
him by default; and the jurors of that jury
having been summoned came, to wit, (here
name the jury, beginning with the first that
was sworn), who being chosen, tried and sworn
to declare the truth of the issue within con-
tained, upon their oaths say, (c) that the within
named *C. D.* did undertake in manner and form
as the within named *A. B.* within complains
against him, and assess the damages of the said
A. B. by occasion of the not performing the
promises and undertakings within mentioned,
over and above his costs and charges by him
about his suit in this behalf expended (d), to

and for those costs and charges to
It is therefore considered, that the
said *A. B.* do (e) recover against the said *C. D.*
his said damages, by the said jury in form afore-
said assessed; and also for his costs and

(a) Their
postea.

(b) *R. A.*
knight, one
of the barons
of our lord
the king's ex-
chequer, and
M. F. one of
the justices of
our lord the
king, assigned
to hold pleas
before the
king himself,
justices of our
lord the king,
assigned to
keep the as-
sises in the
said county of
by
force of the
statute, &c.
came the
within named,
&c.

(c) Verdict
for the plain-
tiff on non af-
sumpsit.

(d) Note;
you set down
in the mar-
gin when

judgment was signed, thus: Judgment signed the day of 1759.

(e) The judgment was, that the plaintiff should recover, instead of do
recover. And after error, the court amended it as the misprision of the
clerk. *E. 13 G. 2. Blakey v. Birmingham, Str. 1132.*

The judgment in Ireland was, that the plaintiff shall recover; and upon
error it was amended to do recover, on the authority of the above case.
T. 14 G. 2. Slater v. Thompson, Str. 1156.

charges

charges by the court of our said lord the king now here adjudged of increase to the said A. B. by his assent, which damages in the whole amount to and that the said L. be in mercy, &c.

Lee and Antonie.

In *ejectment* and in *trespass*, and upon *non est factum* pleaded, instead of saying, "and that the said C. be in mercy, &c." you say, "and that the said C. be *taken*, &c." and "*taken*" in the margin. But note, by the *stat. 4 & 5 Ann. c. 16.* all faults in judgments by *default*, as well as by *verdict* (except the want of an original writ or bill, or warrants of attorney), are cured; therefore the not entering the words *miser cordia* or *capiatur*, or putting the one for the other, is not error, because by the *stat. 16 & 17 Car. 2. c. 8.* those faults are cured after verdict.

Award of a new venire.

If the cause be not tried within the term next after the term in which the issue was joined, then you continue the *venire* on the roll by *vic' non misit breve*; as suppose an issue joined in *Hil.* and tried in the sitting after *Easter*, after the words "the same day [the return of the first *venire* some day in *Hilary*], is given to the parties aforesaid at the same place," say, "at which day before our lord the king at *Westminster* came the parties aforesaid by their attornies aforesaid; and the sheriffs of *London* did not return the said writ, nor did they do any thing thereupon; therefore let a jury, as before, come before our lord the king at *Westminster* on next after

" [the

“ [the first day of *Easter* term], who are in no-
 “ wise a-kin either to the said *A. B.* or to the
 “ said *C. D.* to take cognizance, upon their
 “ oath, of the whole truth of the premisses,
 “ because as well the said *C. D.* as the said *A. B.*
 “ have put themselves upon that jury, the
 “ same day is given to the parties aforesaid at
 “ the same place. Afterwards the process being
 “ continued between the parties aforesaid of the
 “ plea aforesaid, by the jury being respited
 “ between them before our lord the king at
 “ *Westminster*, until next after
 “ (the first day of *Trinity* term being the return
 “ of the *distringas*), then next following, unless
 “ the king's right trusty, &c.” as before.

And in case there should be several terms be-
 tween the term in which your issue is joined,
 and the term in which it is tried, you continue
 awarding *venires* on the roll from term to term,
 on the suggestion that the sheriff does not re-
 turn the writs to the term the *distringas* is sued
 out in, which should bear teste the day of the
 return of the *venire*.

*Judgment against the said defendant on ver-
 dict in debt.*

IT is therefore considered, that the said *A.*
 recover against the said *B.* his said debt, and
 the aforesaid damages by the said jury in form
 aforesaid assessed; and also pounds for his
 costs and charges, by the court of our said lord
 the king now here adjudged of increase to the
 said *A.* by his assent; which damages in the
 whole amount to pounds, &c.

Judgment

Judgment on a demurrer in abatement to a declaration.

COME and defend the force and injury, &c. and pray judgment of the said declaration, because they say, that the said declaration and matter contained therein are not sufficient in law to maintain the said action against them the said B. and C. to which said declaration they the said B. and C. have no need, nor are they obliged by the law of the land, to answer: And this they are ready to verify: Wherefore for want of a sufficient declaration in this case, the said B. and C. pray judgment of the said declaration, and that the said declaration may be quashed, &c.

Joinder.

AND the said A. D. and E. say, that the said declaration, and the matter therein contained, are sufficient in the law for them the said A. &c. to maintain their said action against the said B. and C. which said declaration, and the matter therein contained, the said A. D. and E. are ready to verify and prove, as the court, &c. Wherefore for that the said B. and C. do not deny the said matter in the said declaration, nor make any answer thereto, the said A. &c. pray judgment and their damages, by occasion of the premisses, to be adjudged to them, &c. and because the court of our said lord the king now here is not yet advised, what judgment to give of and concerning the premisses, a day is given to the said parties, that they be before

Continuance
by Curia ad-
visare vult.

our

our lord the king at *Westminster* on

next after

to hear their judg-

ment thereon, because the said court of our said lord the king now here is not yet advised thereof; at which day, before our said lord the king at *Westminster*, came the said parties by their attornies aforesaid; upon which all and singular the said premisses being seen, and by the court of our said lord the king now here understood and considered, and mature deliberation being had thereupon, it appears to the court of our said lord the king now here, that the said declaration, and the matter therein contained, are sufficient in law for them the said

Interlocutory judgment for the plaintiff.

A. D. and *E.* to maintain their said action against the said *B.* and *C.* wherefore the said *A. &c.* ought to recover their damages against the said *B.* and *C.* by occasion of the premisses aforesaid. But because it is unknown to the court of our said lord the king now here, what damages they the said *A. &c.* have sustained by occasion of the premisses, it is therefore commanded to the Sheriff of *Middlesex*, that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages they the said *A. &c.* have sustained, as well by occasion of the premisses, as for their costs and charges by them about their suit in this behalf expended; and that he send the inquisition, which, *&c.* to our

After error in the exchequer chamber, the court amended the judgment, by adding the introductory words to the awarding of the writ of inquiry, viz. *That the plaintiff ought to recover his damages against the defendant.* Hil.

lord the king at *Westminster* on

next after

under the seal, *&c.* and the seals, *&c.*

together with the writ of our said lord the king, to him thereupon directed, *&c.* The same day is given to the said *A. D.* and *E.* at the same place, *&c.* At which day, before our lord the king at *Westminster*, come the said *A. &c.*

16 G. 2. Hil. lersdon v. Skildroy, Str. 1182.

The return of
the inquiry.

For an entry of the return of an inquiry, and
final judgment thereon, see p. 246.

Note; You
enter judg-
ments with-

*Judgment by cognovit actionem et damna,
to save the expence of a writ of inquiry (a).*

out trial upon the like rolls as judgments by trial and verdict; and you may enter them upon the very same rolls; but then remember to leave spaces between the end of one judgment, and the beginning of another judgment, to enter *committitur* (which is when defendant is charged in the king's bench prison), and satisfactions acknowledged upon record, and such other matters as may occasionally follow each judgment. *Inst. Cl. part 1. p. 122, 123.* — When the judgment is confessed, &c. the same term the declaration is of, there is no imparlance entered on the roll. (a) If defendant, after declaration, gives judgment by confession to save the charges of an inquiry, the same is done by under-writing the declaration thus:

I acknowledge this action, and that plaintiff hath sustained damages to pounds, [so that execution be staid until the day of next ensuing.]

Dated 9 Feb. 1750.

B. C.

If a *cesset executio* were for a year after the judgment, yet plaintiff within the next year after may take out execution without a *sci. fa.* but then I think the *cesset executio* should be entered on the roll as above; but concerning this make inquiry.

If on a bond, say, cannot deny but that the said bond is his deed; nor but that he owes to the said A. the said pounds, in such manner and form as the said A. above complains against him: Therefore, &c. *Note*; Costs upon a bond on judgment by confession, &c. only 63s. because the plaintiff may take more equitable costs out of the penalty.

AND the said B. C. by D. E. his attorney, comes and defends the force and injury, when, &c. and saith, that he cannot deny the said action of the said A. nor but that he the said B. undertook in manner and form as the said A. above complains against him; nor also but that the said A. has sustained damages by occasion of the not performing the said promises and undertakings to pounds, as the said A. has by his declaration above supposed; and upon this the said A. prays judgment, and the said

Court of KING's BENCH.

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saïd damages so acknowleged, together with his costs and charges by him about his suit in this behalf expended, to be adjudged to him, &c. Therefore it is considered, that the saïd A. do recover against the saïd B. his saïd damages to pounds above acknowleged; and also pounds for his saïd costs and charges by the court of our saïd lord the king now here adjudged by his assent; which saïd damages in the whole amount to And be the saïd B. in mercy, &c.

Judgment
signed the
day of
1759.

Mercy.

Judgment by non sum informatus, without an imparlance, in debt.

AND the saïd B. by R. S. his attorney, comes and defends the force and injury, when, &c. and the saïd A. prays, that the saïd B. may answer to his the saïd A.'s declaration; whereupon the saïd attorney of the saïd B. says, that he is not informed [or instructed], by the saïd B. to give any answer for him to the saïd A. in the premisses; nor doth he say any thing in bar or denial of the saïd action of the saïd A. by which the saïd A. remains therein undefended against the saïd C. &c. Therefore it is considered, that the saïd A. do recover against the saïd B. his saïd debt, and also for his damages which he has sustained, as well by occasion of the detaining that debt, as for his costs and charges by him about his suit in this behalf expended by the court of our saïd lord the king now here, adjudged to the saïd A. by his assent; and the saïd B. in mercy, &c.

Judgment
signed in
day of
1759.

Mercy.

Nil dicit in debt of the same term with the declaration.

See Lilly's
Ent. 473.

AND the said C. in his proper person comes and defends the force and injury, when, &c. and prays licence to imparle to the said bill; and it is given to him, &c. and upon this a day is given to the parties aforesaid before our lord the king at *Westminster*, until next term after (the day the rule to plead is out), to wit, to the said C. to imparle, and then to answer, &c. At which day before our lord the king at *Westminster* comes the said A. by his attorney aforesaid; and the said C. at that day, though solemnly required, comes not, nor does he say any thing in bar or preclusion of the said action of the said A. by which, &c. (as in the last precedent, p. 243. to the end).

Nil dicit in debt with an imparlance.

AND now at this day (to wit), on next after (the first day of the term the judgment is entered of), in this same term, until which day the said C. D. had licence to imparle to the said bill, and then to answer thereunto, &c. comes before our lord the king at *Westminster* the said A. B. by his attorney aforesaid, and the said C. D. although at the same day solemnly required, comes not, nor does he say any thing in bar or preclusion of, &c. (as before p. 243. to the end).

Nil

Nil dicit in case of the same term with the declaration.

AND the said *E.* by his attorney, comes and defends the force and injury, when, &c. and the said *A.* prays, that the said *E.* may answer to his said declaration; and upon this the said *E.* prays licence to imparle to the said bill of the said *Abrabam*, until next after (the day the rule to plead is out), and it is granted to him, &c. The same day is given to the said *A.* at the same place, &c. At which day before our lord the king at *Westminster* comes the said *A.* by his attorney aforesaid; and the said *E.* at that day, though solemnly required to answer, came not, nor does he say any thing in bar or preclusion of the said action of the said *A.* by which the said *A.* remains therein undefended against him, &c. for which the said *A.* ought to recover against the said *E.* his damages by occasion of the premisses; but because it is unknown to the court of our lord the king now here, what damages the said *A.* has sustained in this case by the occasion aforesaid; It is therefore commanded to the sheriff, that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages the said *A.* has sustained, as well by the occasion of the premisses, as for his costs and charges by him about his suit in this behalf expended; and that he send the inquisition, which he shall thereupon take, to our lord the king at *Westminster* on next after (the return), under his seal, and the seals of those by whose oath he shall take the said

Inquiry
awarded.

The return
of the writ of
inquiry.

Judgment
signed, &c.

Mercy.

saïd inquisition, together with the writ of our
saïd lord the king to him thereupon directed,
The same day is given to the saïd *A.* at the same
place. At which day, before our lord the king
at *Westminster*, came the saïd *A.* by his attorney
aforesaid; and the sheriff, to wit, esq;
sheriff of the saïd county of returned
a certain inquisition taken before him at
in the saïd county of on the
day of in the year of the reign of
our sovereign lord *George* the second now king
of *Great Britain*, &c. by the oath of twelve
good and lawful men of his bailiwick, by
which it is found, that the saïd *A.* has sustained
damages by occasion of the premisses, over and
above his costs and charges by him about his
suit in this behalf expended to pounds,
and for those costs and charges to forty shillings.
Therefore it is considered, that the saïd *A.* do
recover against the saïd *E.* his damages afore-
saïd, by the saïd inquisition above found; and
also pounds, &c. for his saïd costs and
charges by the court of our saïd lord the king
now here adjudged of increase to the saïd *A.*
by his assent; which damages in the whole
amount to And the saïd *E.*
in mercy, &c.

Nil dicit in case with an imparlance.

AND now at this day, to wit, on
next after (the first day of the
term the judgment is entered of), in the same
day, to which day the saïd *C. D.* had licence to
imparle to the saïd bill, and then to answer, &c.
before our lord the king at *Westminster*, the saïd
A.B

A. B. comes by his attorney aforesaid, and prays, that the said *C. D.* may answer his said declaration; and the said *C. D.* although at that day solemnly required, comes not, nor does he say any thing in bar or preclusion of the said action, by which the said *A. B.* remains thereof undefended against him, for which the said *A. B.* ought to recover against the said *C. D.* his damages *by occasion of the premisses* *. But because, &c. (as before, p. 245).

* If in trespass, you say, *by occasion of the said trespass.*

If in assault, *by occasion of the said trespass and assault.*

If in trespass, assault and imprisonment, *by occasion of the said trespass, assault and imprisonment.*

If in covenant, *by occasion of breaking the said covenant.*

Non sum informatus in case.

AND the said *C.* by *J. C.* his attorney, comes and defends the force and injury, when, &c. and the said *A.* prays, that the said *C.* may answer to his the said *A.*'s declaration; whereupon the said attorney says, that he is not instructed by the said *C.* his client to give any answer for him to the said *A.* in the premisses, nor doth he say any thing in bar or denial of the said *A.*'s action; whereby the said *A.* remains therein undefended by the said *C.* for which cause the said *A.* ought to recover, &c.

If in *assumpsit*, then thus:

Ought to recover his damages against the said *C.* by reason of his not performing his said promises

The present Practice of the

promises and undertakings; but because his said majesty's court now here before the king himself know not what damages, &c.

If in trespass, then, by reason of the trespass aforesaid, or trespass and assault, as the case is.

If it be in debt, then thus:

When you come to the words *remains therein undefended*, you say, instead of the words *for which cause the said A. ought to recover*, &c. therefore it is adjudged, &c.

Non sum informatus to the first promise, and issue on the second with a unica taxatio.

AND the said C. by R. S. his attorney, comes and defends the force and injury, when, &c. And as to the first promise and undertaking mentioned in the said declaration, the said attorney saith, that he is not instructed by the said C. to give any answer for him the said C. to the complaint of the said A. and says nothing more thereto; whereby the said A. remains undefended by the said C. for which cause the said A. ought to recover against the said C. his said damages occasioned by the non-performance of the said first promise mentioned in the said declaration; and as to the said second promise mentioned in the said declaration, the said C. saith, that he did not undertake in such manner and form as the said A. hath above complained against him; and of this he puts himself upon the country, and the said A. doth likewise the same; and because it is convenient and necessary, *Unica taxatio*, that there should be only one taxation of the damages occasioned by reason of the premisses, therefore let the writ of inquiry of damages cease

till

till the issue above joined between the said parties be determined; therefore as well to try the said issue joined between the said parties, as to inquire what damages the said C. hath sustained in that behalf, the sheriff is commanded, &c.

Judgment by cognovit actionem by administrators.

SAY they cannot deny, but that the said bond is the deed of the said G. nor but that they detain from the said H. the said pounds, in such manner and form as the said H. above complains against them; therefore it is adjudged (as above); and also for his damages which he hath sustained, as well occasioned by the detaining of his said debt, as for his expences and costs laid out by him in prosecuting this suit, awarded by this court to the said H. with his consent to be levied of the goods and chattels in their hands unadministered, which were the said G.'s at the time of his death, if they have so much in their hands unadministered, and if they have not so much in their hands, then the said damages to be levied of the proper goods and chattels of the said A. and B. And the said A. and B. in mercy, &c.

Judgment of assets in futuro, after plene administravit pleaded.

AND the said A. and B. inasmuch as the said E. by her plea doth not deny, but that the said writing obligatory is the deed of the said C. nor but that the said debt contained in the same writing is a true and just debt yet unpaid, and by the said subject matter above pleaded

pleaded by the said *E.* saith nothing in bar or denial of the action of the said *A.* and *B.* but that she hath no goods or chattels in her hands unadministered, which were of the said *J.* at the time of his death; and for that the said *A.* and *B.* are not yet advised but that the plea of the said *E.* may be true, they pray judgment for their said debt by them above demanded, to be levied of the goods and chattels which were of the said *J.* at the time of his death, that shall hereafter come to the hands of the said *E.* to be administered; therefore it is adjudged, that the said *A.* and *B.* do recover against the said *E.* his said debt, to be levied of the goods and chattels which were of the said *J.* at the time of his death, that shall hereafter come to the hands of the said *E.* to be administered; and the said *E.* in mercy, &c.

Upon *plene administravit* pleaded, the plaintiff may immediately take judgment of assets *in futuro.* And it is usual for his attorney to give defendant's attorney notice thereof, upon being served with a rule to reply, &c.

Judgment by cognovit actionem, where the defendant acknowledges damages to 20l.

AND the said *C.* in his proper person comes and defends the force and injury, when, &c. and saith, that he cannot deny the said action of the said *A.* nor but that he the said *C.* undertook (or made such promise) in such manner and form as the said *A.* hath above thereof complained against him; nor also but that the said *A.* hath sustained damages by reason of non-performance of the said promises and under-

undertakings to 20*l.* as he the said *A.* hath above supposed in his declaration; and thereupon the said *A.* prays, that the damages so acknowledged, together with his expences and costs laid out by him about his suit in this behalf, may be awarded to him: Therefore it is adjudged, that the said *A.* do recover against the said *C.* his said damages above acknowledged to 20*l.* and also pounds for his expences and costs, awarded by the court of our sovereign lord the king now here to the said *A.* by his consent; which said damages in the whole amount to pounds; and the said *C.* in mercy, &c.

Dockets.

Docketing entries.] Get numbers for your rolls from the *nisi prius* office, or from Mr. Heberden; Docket your entries on a piece of *unstamped* paper; carry them and the rolls to Mr. Child, and he will mark the roll and give it you back. Pay him 3*s.* if the pleadings are paid for before, and to Mr. Tully 4*d.* each warrant, when you carry in the roll.

The form of the docket paper.

ENTRIES of *A. B.* gentleman, one, &c. of the term of *St. Hilary*, in the year of the reign of *George* the second now king of *Great Britain*, &c.

Witness *Wm.* Lord *Mansfield*.

Middlesex, says nothing in debt upon a bond between *C. D.* assignee of *E. F.* esq; late sheriff of the county of *Middlesex*, plaintiff, and *G. H.* otherwise called *G. H.* of, &c. gent. defendant, as well for 100*l.* debt as for costs. } *Roll 56.*

London, to wit, says nothing in debt for 100*l.* upon bond, between *A. B.* plaintiff, and *C. D.* otherwise called, &c. defendant, and for for damages and costs. } *Same Roll.*

Gloucester. Not guilty in trespass, between *A. B.* plaintiff, and *C. D.* defendant. } *Roll 60.*

—— Not informed in debt upon a *mutuatus* between, &c. as well for 500*l.* debt as 63*s.* for costs. } *Same Roll.*

Middlesex. *Non profs* in debt for want of a replication, between *C. D.* widow, administratrix of *E. F.* plaintiff, and *G. H.* defendant. } *Roll 61.*

—— Entry

— Entry of a *sci. fa.* in debt, }
between *A. B.* plaintiff, and *C. D.* } *Same Roll.*
defendant, as well for in
debt as for costs.

— Issue of *nul tiel record* in }
case, between *A. B.* plaintiff, and } *Roll 62.*
C. D. defendant.

NOTE.

For the doggeting and better discovery of judgments, see *stat. 4 & 5 W. & M. c. 20.*

Rolls.

When to be carried in.] No plea roll to be filed after the end of the next term following that which it ought to be filed of, unless by a rule of court. *Rule Mich. 9 W. 3.*

The rolls to be brought into the office fairly ingrossed in a good full court band (a), by the (a) Now in times limited by former (b) rules, that is to a common band, see *stat. 4 G. 2. c. 26.* say, the rolls of *Trinity, Mich. and Hil. terms,* before the effoin day of every subsequent term, 5 *G. 2. c. 27.* and the rolls of *Easter term* before the first day 6 *G. 2. c. 14.* of *Trinity term.* And no attorney, or any other (b) *M. 9, & T. 10 W. 3.* person, shall take any numbers, or file any rolls, but the (c) clerks of the chief clerk of (c) There is this court only. *Rule M. 5 Ann.* no distinction now between

But the *custos brevium*, by way of indulgence, attends the day but one before every term to receive and file rolls. *clerks and attornies.*

NOTES.

NOTES.

The same was done in the *Cafe of Needham v. Grano.* *E. 9 G. 1.* where the roll was *lost* by the attorney, *ibid.* 141. —

1. The roll of the judgment was carried in *Trin.* 1720. and docketed, but before filed was *mislaide* and *lost*. Leave was given to file a new roll, defendant being dead, and the executrix consenting; for there being a docquet, it could be no deceit upon purchasers. *E. 2 G. 2. Evans v. Thomas, Str.* 833.

Loss of a record supplied by a new entry. *Hil.* 5 G. 2. *King qui tam v. Bolton. Ibid.*

2. Judgments not docketed not to affect purchasers. See *stat.* 4 & 5 W. & M. c. 20. f. 3.

(a) The writ of *scire facias*

Scire facias (a).

was given by the statute of *Westm.* 2. c. 45. Before that statute, if the plaintiff had not taken out his execution upon a judgment against the defendant within a year and a day, he had no remedy at the common law, but a new action of debt on his judgment; but now a *scire facias* may be sued out to revive the judgment. 3 *Mod.* 187, 189.

Of reviving a judgment by *scire facias* post annum et diem.

In what cases a scire facias to revive, &c. must issue.] If execution be not taken out within a year and a day after judgment is obtained, there must be a *scire facias* sued out to revive the judgment, directed into the county where the original action was brought; for it shall be intended, that the party against whom the judgment was obtained doth inhabit still in that county, and execution cannot be taken out before a *scire facias* is sued out, and judgment thereupon obtained.

The

The plaintiff may, at any time within a year of the issuing the *scire facias*, sue forth an execution, and continue the same on the roll on which the *scire facias* is entered; but if he doth not take out execution within the year, the judgment must be again revived by *scire facias*.

Where either plaintiff or defendant, or one of the plaintiffs or one of the defendants die, there cannot be any execution sued out upon the judgment, until a *scire facias* sued out by the heir, executors or administrators, and judgment thereupon, because there must be a new judgment upon the *scire facias* to warrant the execution, that being different from the old judgment. See statute 8 & 9 W. 3. c. 10. *Styles's Pract. Reg.* 449.

Where plaintiff or defendant dies after interlocutory judgment, and before final judgment the action shall not abate, but may be revived by *scire facias*, but not so as to

empower the executor, &c. of a deceased plaintiff to carry on an action which he as executor, &c. could not have originally brought, or to load the executor, &c. of a deceased defendant, with an action, that could not have been originally brought against such executor. See Stat. 8 & 9 W. 3. c. 10.

When a scire facias need not be sued out.
Upon a judgment obtained, and all parties living, if a *fi. fa. ca. sa.* or *elegit*, be taken out within the year, and returned and awarded upon the roll, the same may be continued down from term to term to the time of the execution thereof, although after the year, and be as effectual as if the judgment had been revived by *scire facias*.

If a *cesset executio* were for a year after the judgment obtained, yet the plaintiff within the next year after may take out execution without a *scire facias*. But Q. if the *cesset executio* should not be entered on the roll?

If

If the defendant brings a writ of error, and delays the plaintiff for a year, and then he is nonsuited, he may take out an execution without a *scire facias*.

Execution being stayed by injunction out of Chancery for above a year, the injunction being dissolved, plaintiff took out execution without a *scire facias*. *Per Cur'*; We cannot take notice of the Chancery injunction, and you might have taken out a writ of execution, and continued it by *vicecomes non misit breve*. A *super-Jedeas quia improvide* was awarded to the execution. *Salk.* 322.

When a scire facias may be sued out of course, and when not without leave.] A writ of *scire facias* after a year and a day may be had of course against the defendant, without motion.

But if the judgment be of *ten years* standing, or *above*, and no execution has been taken out thereon, the plaintiff cannot sue out a *scire facias* without first moving the court, and obtaining a rule for that purpose; and in order to obtain such rule, there must be an affidavit made of the debt being unsatisfied, and the judgment not vacated, and that defendant is living.

And if the judgment be above *seven* years standing, plaintiff cannot have a *scire facias* to revive, without a motion at the *side-bar*.

If after motion and judgment revived by *scire facias*, the defendant dies *before* execution, the plaintiff must sue out a *new sci. fa.* but may have it without motion, for the judgment was revived before; *per Cur'*. *Salk.* 598.

Of suing out *scire facias* to revive, &c.] Write it on a 2s. stamped piece of parchment; make out a *præcipe* for the office; pay Mr. Heberden for signing the *scire facias* 1s. 8d. sealer for sealing 7d.

Ordered, that upon the issuing of any writ of *scire facias* upon any cause here in court depending, no writ of *alias scire facias* shall thereupon issue until the *first* writ of *scire facias* be returnable; and if any writ of *alias scire facias* shall be sued out contrary to this rule, then such *alias scire facias* shall be void. Rule T. 8 W. 3. Vide Salk. 599. 6 Mod. 86. — Note; *scire facias*'s by original are made out by the filazer of the county. — Where two *scire facias*'s issue, returnable in different terms; the *first* must be entered of the term wherein it is returnable, and an award of the *second* is sufficient without setting it forth at length.

Of teste and return of *scire facias* to revive, &c.] A *scire facias* Every *scire facias* by original ought to have was tested 15 15 days *exclusive* between the teste and return, May, return- unless helped by the stat. 16 Car. 1. c. 6. and able the 29th, 13 Car. 2. c. 2. But if the proceedings are by which is making both the bill 15 days *inclusive* between the teste of the teste and return *inclusive* of the 15 days; first and return of the second *scire facias* are sufficient. Salk. 599. Mod. Ca. in Law and Eq. of the 15 days; and upon consideration it was held well enough, and that there was no difference whether the proceeding was by bill or by original. T. 13 G. 1. Hicks v. Jones, Str. 765.

Each *scire facias* should have seven days between the teste and return, and not one *ten* or *eleven*, and the other *four* or *five*.

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But if one *scire facias* only issue, and a *scire feci* be returned, the time between the teste and return of the *scire facias* is not settled to any certain number of days, but must lie *four days exclusive* in the sheriff's office before the return.

See 6 Mod.
86.
Salk. 599.

Every writ of *alias scire facias* should bear teste the day of the return of the first, unless it be a *scire facias quare executionem non* on a writ of error, in which case it has been held not to be necessary.

Of leaving scire facias to revive, &c. with the sheriff.] A *scire facias* to revive must lie 4 days in the sheriff's office, as well where a *scire feci* is returned as a *nichil*. *M. 4 G. 2. Williams v. Mason, Str 644.* But see the following rule.

Every *scire facias*, of which notice shall be given to the defendant or defendants named in such writ, shall be delivered to the sheriff to whom directed, or left at his office *four days* before the return of such writ *exclusive* of the day on which such writ is returnable. *Rule E. 5 G. 2.*

Every *first* writ of *scire facias* on which a *nichil* shall be returned, shall be delivered to the sheriff, or left in his office *some time* before the return of such writ. *Same Rule.*

And every writ of *alias scire facias* shall be delivered to the sheriff, or left in his office *four days* exclusive before the return of such writ. *Same Rule.*

And every sheriff shall *write* or *indorse* on every *scire facias* the day of the month and year, on which the same is delivered to him or left in his office, *Same Rule.*

Of warning defendant.] No time settled for warning the defendant before the return of the writ.

writ. — But it is said, if he be summoned the day before, or even on the day of the return of the writ, it is sufficient.

NOTE.

Motion to stay proceedings on a scire facias, because it was not served till the day before the return; sed per Cur, If it lay four days in the office, that is all which is required; the summons may be made any time before the court is up on the day of the return. M. 12 G. 1. Obrian v. Frazer, 1 Str. 644. — T. 4 G. 2. Bland. v. Perry, it was so ruled again, on debate. Ibid.

[Of appearing to the scire facias.] If the defendant appears to the scire facias, and can shew good cause, as a *release, satisfaction*, or any other just cause, he may plead it in discharge.

[Of return of scire facias to revive, &c. by the sheriff, and giving rule to appear and plead.] If the sheriff return upon the scire facias a *scire feci*, you give a rule with the clerk of the rules for the defendant (a) to appear and plead, which rule is out in four days *exclusive* (b); and if the defendant does not appear and plead before the rule is expired, the plaintiff is intitled to have present execution.

(a) Or bail, as the case is.
(b) Sunday is not reckoned a day.

But if the sheriff return a *nihil habet* upon the scire facias, you sue out an *alias scire facias*, and get it returned in the same manner, and when you have two *nibils* returned, it amounts to a *scire feci*, and then the plaintiff, after he has given a rule on the *alias scire facias* with the clerk of the rules, and the same is expired, may enter up

judgment of course, and sue out what execution he pleases.

Where the proceedings are not had upon a scire facias within a year and a day.] If you do not proceed upon a *scire facias* within a year and a day after it is taken out, you cannot after that proceed upon that writ, but must sue out a new *scire facias*, for the old writ is discontinued.

Venire, distringas and jurata.] In the *venire, distringas and jurata* for a trial upon a *scire facias*, after the words, *of a plea of debt or trespass, [as the action is]* you add these words, *whereupon a scire facias, and so forth.*

How to obtain a judgment de bonis propriis against an executor or administrator.] If you get judgment by default in an action against an executor or administrator (which is *de bonis* of the party deceased only) the old way was on *nulla bona* returned on a *fieri facias* to issue out a writ to the sheriff, to enquire whether the defendant had wasted any of the effects of the deceased, and upon a *devastavit* returned by inquisition to proceed by *scire facias* for the defendant to shew cause why the plaintiff should not have judgment *de bonis propriis*; to which the defendant might appear and plead *plene administravit*. But now the *fieri facias*, inquiry and *scire facias* are for the sake of expedition made out in one writ.

But this is not a good way to proceed, where the debt is but *small*, the plaintiff being allowed no costs after the *first* judgment, unless the defendant appears and pleads to the *scire facias*. The best way therefore is to bring an action of debt on the judgment suggesting a *devastavit*.

A scire

A scire facias to revive a judgment in debt after a year and a day.

Note; Scire facias's by original are made out by the fi-

GEORGE the second, &c. to the sheriffs of London, greeting. Whereas *A. B.* lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against *C. D.* otherwise called *C. D.* of &c. — pounds for a debt [or of a debt] and also — shillings for his damages which he sustained, as well by means of detaining that debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* is convicted, as appears to us of record; and now on the behalf of the said *A. B.* we have been informed, that, although judgment be thereupon given, yet execution for the said debt and damages still remains to be made to him; whereupon the said *A. B.* hath humbly besought us to provide him proper relief in this case; and we being desirous, that what is right and just should be done on this occasion, command you, that by good and lawful men of your bailiwick you cause it to be known to the said *C.* that he be before us at *Westminster* on — next after &c. to shew if he has or knows of any thing to say for himself why the said *A.* ought not to have his execution against him for the said debt and damages, according to the force, form and effect of the said recovery, if it shall seem expedient to the said *A.* so to do; and farther to do and receive what our said court before us shall then and there consider of in this behalf; and have you there at the same time the names of those by

lazer of the county. —
Scire facias not amendable, but it must be quashed. *M. 7 G. 1. Hillier v. Frost, Str. 401.*

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whom you shall so cause it to be known to him, and this writ. Witness *Wm. Lord Mansfield, &c.*

If parcel of the debt, &c. is satisfied by a levy on a *fieri facias*, then say, as before, to

As it appears to us of record; and now on behalf of the said *A. B.* in our court before us, we are informed, that he has been satisfied for pounds, parcel of the said debt and damages, and that, altho' judgment for the said debt and damages be given, yet execution for pounds residue of the said debt and damages still remains to be made to him; whereupon the said *A. B.* hath prayed us, that, &c. [*as before to*] why the said *A. B.* ought not to have his execution against the said *C. D.* for the said pounds, residue of the said debt and damages, according to the force, form and effect of, &c. *as before.*

A scire facias against an administrator, in case.

GEORGE the second, &c. To the sheriff of *Middlesex*, greeting. Whereas *A. B.* lately in our court before us at *Westminster*, by bill, without our writ, and by the judgment of the same court, recovered against *C. D.* pounds for his damages which he had sustained, as well by the occasion of the not performing certain promises and undertakings made by the said *C.* to the said *A.* as for his

his expences and costs by him laid out about prosecuting his suit in that behalf, whereof the said *C.* is convicted, as appears to us of record; and now on the behalf of the said *A.* we have received information in our court before us, that, although judgment be given, yet execution of the said judgment remains to be made to him, and the said *C.* is now dead intestate, and administration of all and singular the goods and chattels, rights and credits which were the said *C.*'s at the time of his death, was committed to *M. D.* widow and relict of the said *C.* after his decease, in due form of law, at *Westminster* in your county, as in our court before us we have received information from the said *A.* whereupon the said *A.* has besought us to provide him a proper remedy in this particular; and we being willing that what is right and just should be done in this case, we command you, that by good and lawful men in your bailiwick you cause it to be known to the said *M.* that she be before us at *Westminster* on — next after, &c. to shew if she has or knows of any reason why the said *A.* ought not to have his execution against her for his said damages, expences and costs, of the goods and chattels which were the said *C.*'s at the time of his death, and that are unadministred in the hands of the said *M.* according to the force, form and effect of the said recovery, if it shall seem expedient to the said *A.* to do so, and further to do and receive what our said court before us shall then and there consider of in this behalf; and have you there then the names of those by whom you shall so cause it to be known to her, and this writ. Witness, &c.

An alias scire facias to have an execution in debt upon a judgment recovered by an executrix.

*Note; An alias scire facias differs from the first in nothing except the *teste* and *return*, and by adding after the words, *command you*, these words, *viz. as we have heretofore commanded you*.*

GEORGE the second, &c. To the sheriffs of *Middlesex*, greeting. Whereas *A. B.* widow, executrix of the last will and testament of *C. B.* her late husband deceased, lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against *E. F.* otherwise called *E. F.* of &c. pounds for a debt, and shillings for damages, which she had sustained, as well by occasion of detaining the said debt, as for her expences and costs laid out by her about her suit in that cause, whereof the said *E.* is convicted, as appears to us of record; and now on the part of the said *A.* we have received information in our court before us, and that, altho' judgment be given, nevertheless execution remains to be made to her, wherefore the said *A.* has besought us to provide her a proper remedy; and we being willing, that whatsoever is right and just should be done to her in this case, we command you, as we have heretofore commanded you, that by good and lawful men of your bailiwick you cause it to be known to the said *E.* that he be before us at *Westminster* on — next after, &c. to shew if he knows of or has any thing to say for himself why the said *A.* ought not to have an execution against him for the said debt and damages, according to the force, form and effect of the said recovery; and further to do and receive those things that our said court before us shall then and there consider of in this case; and have you there at the same time the names of

of those by whom you shall so cause it to be known to him, and this writ. Witness, &c.

vered by an executor, the death of the testator need not to be shewn. T. 11 G. 1. *Morfoot v. Chivers & ux*, Str. 631. *Ld. Raym.* 1395.

Scire facias for an administrator of a plaintiff dying after interlocutory judgment and before a writ of inquiry of damages is executed. See 3 Mod. 142. Salk. 315.

GEORGE the second, &c. to the sheriffs of London, greeting. Whereas *A. B.* heretofore in our court before us at *Westminster*, by bill without our writ impleaded *C. D.* being in the custody of the marshal of our *Marshallsea* before us, for that, to wit, that whereas (here recite the whole declaration to) to the damage of the said *A. B.* of pounds, as he said, and thereupon he brought suit, and so forth. And in such manner were the proceedings in our said court before us at *Westminster*, that afterwards, to wit, in the term of — last past it was considered by our said court before us, that the said *A. B.* ought to recover against the said *C. D.* his damages occasioned by the not performing of the several promises and undertakings aforesaid; but because it was unknown to our said court before us what damages the said *A. B.* had sustained by occasion of the premisses aforesaid, it was commanded to the then sheriffs of *London*, that by the oath of twelve good and lawful men of their bailiwick they should diligently inquire, what damages the said *A. B.* had sustained, as well by occasion of the not performing the several promises and undertakings aforesaid, as for his costs and charges

(a) or together
with that
writ.

Scire facias
on a judgment
in *B. R.* the
administrator
produced ad-
ministration
by the arch-
bishop of *York*,
and because
the judgment
was assets at
Westminster in
the province
of *Canterbury*,
this admini-
stration did
not extend to
it. *E. 1 Ann.*
Carlile and
Greenwood in
B. R. 6 Mod.
15.

charges by him about his suit in that behalf ex-
pended; and that they should send the inquisition
which they should take, to us at *Westminster* at
a certain day now past, under their seals and
the seals of those by whose oath they should
take that inquisition, together with our said
writ thereupon directed to them (a); and the
same day was given to the said *A. B.* before us
at *Westminster* aforesaid; as by the record and
proceeding thereupon now remaining in our said
court before us at *Westminster* plainly appears; yet
inquisition of the said damages still remains to be
made; and the said *A. B.* after interlocutory judg-
ment had been given in form aforesaid died in-
testate, to wit, at *London* aforesaid, and so forth;
after whose death, to wit, on the day of
 in the year of our Lord at *London*
aforesaid, and so forth, administration of all and
singular the goods and chattels, rights and credits
which were of the said *A. B.* at the time of his
death, was by *John*, by divine providence arch-
bishop of *Canterbury*, primate of all *England*,
and metropolitan, to whom the granting the said
administrations of right belonged, in due manner
committed to one *E. B.* widow, late wife of the
said *A. B.* as on the information of the said *E. B.*
we have been given to understand; and because
we are willing, that those things which have
been rightly done and adjudged in our said court
before us, should be duly executed, we com-
mand you, that by good and lawful men of your
bailiwick you make known to the said *C. D.*
that he be before us at *Westminster*, on
next after to shew, if any thing he has or
knows to say for himself, why the said damages in
the said action ought not to be assessed, and reco-
vered by the said *E. B.* according to the form and
effect

effect of a certain statute in such case lately made, and provided, if it shall seem expedient, and so forth; and have there then the names of those by whom you shall make known to him, and this writ. Witness, &c.

Entry of two scire facias's and nichils returned, and judgment thereon against an administrator, in case, on a judgment against his intestate.

Michaelmas term in the year of king George the second.

Middlesex, OUR lord the king gave in the to wit. **O** charge (or sent) to the sheriff of *Middlesex* his writ close in these words, to wit, George the second, &c. to the sheriff of *Middlesex*, greeting. Whereas *A. B.* lately in our court before us at *Westminster*, by bill, without our writ, and by the judgment of the same court, recovered against *C. D.* pounds for his damages which he sustained as well by means of the not performing certain promises and undertakings by the said *C. D.* made to the said *A. B.* as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* was convicted, as appears to us from the record; and now on the behalf of the said *A. B.* in our court before us we have been informed, that, although judgment be thereupon given, yet execution of that judgment still remains to be made to him, and that the said *C. D.* is dead, and died intestate, and that administration of all and singular the goods and chattels, rights and credits which were of the said *C. D.* at the time

time of his death, was after the death of the said *C. D.* to wit, at *Westminster* in your county, in the due form of law committed to *E. D.* widow and relict of the said *C. D.* as on the information of the said *A. B.* in our said court before us we have been also informed; whereupon the said *A. B.* hath humbly intreated us, that a proper remedy may be provided for him in this behalf; and we being willing, that that which is just should be done on this occasion, command you, that by good and lawful men of your bailiwick you cause it to be known to the said *E. D.* that she be before us at *Westminster* on next after

to shew if any thing she has or knows to say for herself why the said *A. B.* ought not to have execution against her for the damages, costs and charges aforesaid, of the goods and chattels which were of the said *C. D.* at the time of his death in her hands to be administred, if it shall seem expedient, and so forth; and further to do and receive what our said court before us shall then and there consider of her in this behalf; and have you there then the names of those by whom you shall so cause it to be known to her, and this writ. Witness, (naming the chief justice) at *Westminster* the day of in the year of our reign.

At which day before our lord the king at *Westminster* the said *A. B.* came in his proper person, and the sheriff of *Middlesex*, to wit, and sheriff of the said county, returned, that the said *E. D.* had not any thing in his bailiwick whereof or by which he could make known to her, neither was she found in the same; therefore, as before, it is commanded to the sheriff, that by good and lawful men of his bailiwick he make known to the said *E. D.* that she be before our

our lord the king at *Westminster* on next
 after to shew in form aforesaid, if, and
 so forth; and further, and so forth; the same
 day is given to the said *A. B.* there, and so forth;
 at which day before our lord the king at *West-*
minster came the said *A. B.* in his proper person,
 and the sheriff as before returned, that the said
E. D. had not any thing in his bailiwick where
 or by which he could make known to her, nei-
 ther was she found in the same; and the said
E. D. although at that day solemnly required
 came not, but made default; it is therefore con-
 sidered, that the said *A. B.* may have his execu-
 tion against *E. D.* of the goods and chattels
 which were of the said *C. D.* at the time of his
 death in the hands of the said *E. D.* to be ad-
 ministrated, if she has so much in her hands, by
 the default of the said *E. D.* and so forth.

*Note; The
 master is to
 sign judgment
 on the roll.*

If it be against executors, the scire facias runs thus:

Scire facias against executors.

GEORGE, &c. to the sheriff of
 greeting. Whereas *B. B.* lately in our
 court, &c. (as before to) as it appears to us of re-
 cord, and afterwards the said *C. D.* at
 in your county made his last will and testament
 in writing, and thereby appointed *E. F.* and
G. H. executors thereof, and afterwards died
 there, the said *A. B.* being no ways satisfied of
 his damages, costs and charges aforesaid; and now
 on the behalf of the said *A. B.* in our court before
 us, we have been informed, that although the said
 judgment be given, yet execution of that judg-
 ment still remains to be made to him; whereupon
 the said *A. B.* hath humbly intreated us, &c.

Entry

Entry of a final judgment against the executor of a defendant dying before writ of inquiry.

Judgment for
plaintiff on
demurrer to
declaration.

Writ of inqui-
ry awarded.

AT which day before our lord the king at *Westminster* came the parties aforesaid, by their attornies aforesaid, upon which all and singular the premisses being considered, and by the court of our lord the king here fully understood, and mature deliberation being thereupon had, it appears to the court of our lord the king here, that the said declaration and the matter therein contained is good and sufficient in the law to hold and maintain the said action of the said *A. B.* against the said *C. D.* wherefore it is considered, that the said *A. B.* ought to recover against the said *C. D.* his damages which he has sustained by occasion of the premisses, and because it is unknown to the court of our lord the king before the king himself now here what damages the said *A. B.* has sustained by occasion of the premisses, it is therefore commanded to the sheriffs of *London*, that by the oath of twelve good and lawful men of their bailiwick they diligently enquire what damages the said *A. B.* has sustained, as well by occasion of the premisses, as for his costs and charges by him about his suit in this behalf expended, and that the inquisition which they should thereupon take they should make apparent to our lord the king at *Westminster* on next after under their seals and the seals of those by whose oaths they should take that inquisition, together with the said writ thereupon directed to them. A day is given to the said *A. B.* there, and so forth. At which day before our lord the king at *Westminster* came the said *A. B.* by his attorney aforesaid,

said, and the sheriffs did not return the said writ, *Vic' mis.*
 nor did they do any thing thereupon, and the *breve.*
 said *C. D.* did not come; and upon this the said
A. B. says, that the inquisition of the said da-
 mages still remains to be made, and that the
 said *C. D.* after the said interlocutory judgment
 was given in form aforesaid, and before any final
 judgment obtained in the said action, and before
 this day, at *London* aforesaid, in the parish and Defendant
 ward aforesaid, made his last will and testament made his will,
 in writing, and by his said last will constituted
 and appointed one *E. D.* his wife executrix of
 his said will, and the said *C. D.* afterwards died and died.
 there; after whose death and before this day, the
 said *E. D.* proved the said testament in due form Executrix
 of law, and took upon her the burden and execu- proves the
 tion of the said testament, to wit, at *London* afore- will.
 said, in the parish and ward aforesaid; and because
 this is not denied, but the said allegation of the
 said *A. B.* to the court of our said lord the king
 now here appears to be true: Therefore the said
A. B. prays the writ of our lord the king of
scire facias against the said *E. D.* executrix of
 the said testament, according to the form of the
 statute in such case made and provided, to be
 directed to the sheriffs of *London* aforesaid, and
 it is granted to him, and so forth; whereby it
 is commanded to the sheriffs of *London*, that *Scire facias*
 by good and lawful men of their bailiwick they awarded.
 make known to the said *E. D.* that she be be-
 fore our lord the king at *Westminster* on
 next after to shew if any thing she has or
 knows to say for herself why the said damages in
 the said action ought not to be assessed, and reco-
 vered by the said *A. B.* if it shall seem expe-
 dient, and so forth; At which day before our
 lord the king at *Westminster* came as well the
 said

Executrix appears.

Scire feci.

Nil dicit.

Inquiry awarded.

Return.

said *A. B.* by his attorney aforesaid, as the said *E. D.* in her proper person; and the sheriffs of *London*, to wit, esq; and esq; return, That by virtue of the said writ to them directed by and good and lawful men of their bailiwick, they had made known to the said *E. D.* that she should be before our lord the king at the day and place in the said writ contained, to shew as the said writ demands and requires; and the said *E. D.* says nothing, nor shews nor alledges any matter to arrest final judgment in the said action, or why the said damages in the said action ought not to be assessed and recovered by the said *A. B.* Therefore at the prayer of the said *A. B.* by the court of our lord the king now here, it is commanded to the sheriffs of *London*, that according to the form of the statute in such case lately made and provided, by the oath of twelve good and lawful men of their bailiwick they diligently enquire what damages the said *A. B.* has sustained, as well by occasion of the premisses as for his costs and charges by him about his suit in this behalf expended, and that they send the inquisition which, and so forth, to our lord the king at *Westminster* on next after under their seals and the seals of, and so forth, together with the writ of our said lord the king now thereupon directed to them. The same day is given to the said *A. B.* there, and so forth. At which day before our said lord the king at *Westminster* came the said *A. B.* by his attorney aforesaid; and the sheriffs of *London* aforesaid, to wit, esq; and esq; sheriffs of *London* aforesaid, by virtue of the said writ to them thereupon directed, return a certain inquisition taken before them at the *Guildhall* of the city of *London*, situate in

in the parish of *S. Lawrence* in the *old Jury* in
in the ward of *Cheape* in the said city, on the
day of in the year of
the reign of our sovereign lord *George* the se-
cond, now king of *Great Britain*, and so forth,
by the oath of twelve, and so forth; by which
it is found, that the said *A. B.* had sustained da-
mages by occasion of the premisses, besides his
costs and charges by him about his suit in this
behalf expended, to pounds, and for
those costs and charges to It is therefore

considered, that the said *A. B.* recover against the said *E. D.* his damages aforesaid by the said
inquisition found in form aforesaid, as also
Final judg-
ment *de bonis*
testatoris.

which by the court of our said lord
the king now here were adjudged of increase
to the said *A. B.* by his assent for his said
costs and charges, which said damages in the
whole amount to to be levied of the
goods and chattels of the said *C. D.* at the
time of his death in the hands of the said *C. D.*
to be administred, if she has so much in her
hands, and so forth.

*Scire facias against an administrator of a
defendant dying after interlocutory judg-
ment.*

GEORGE the second, &c. to the sheriff of
Middlesex, greeting. Whereas *A. B.* lately
in our court before us at *Westminster*, to wit,
in *Michaelmas* term last past, by bill without
our writ impleaded *C. D.* then being in the
custody of the marshal of our *Marshalsea* be-
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fore us, for that, to wit, that whereas (here recite the whole declaration to) to the damage of the said *A. B.* of pounds, as he said, and thereupon he brought suit, and so forth, and in such manner were the proceedings in our said court before us at *Westminster*, that the said *A. B.* ought to recover his damages, by occasion of the not performing the several promises and undertakings aforesaid; but because it was unknown to our said court before us what damages the said *A. B.* had sustained by occasion of the premisses aforesaid; we therefore commanded you, that by the oath of twelve good and lawful men of your bailiwick you should diligently inquire what damages the said *A. B.* had sustained, as well by occasion of the not performing the several promises and undertakings aforesaid, as for his costs and charges by him about his suit in that behalf expended, and that you should send the inquisition which you should thereupon make to us at *Westminster* on next after last past, under your seal and the seals of those by whose oath you should take that inquisition, together with that writ. And the same day was given to the said *A. B.* before us at *Westminster* aforesaid, as by the record and proceedings thereupon remaining in our court before us at *Westminster* manifestly appears; and whereas before the said next after

Death of defendant.

the said *C. D.* at *Westminster* in your county died intestate, and the inquisition of the damages aforesaid still remains to be made, and one *E. D.* widow and relict of the said *C. D.* is administratrix of all and singular the goods and chattels which were the said *C. D.*'s her late husband deceased,

as on the information of the said *A. B.* we have been given to understand; and because we would that those things which in our said court before us have been rightly acted, should be duly executed, we command you, that by good and lawful men of your bailiwick you make known to the said *E. D.* that she be before us at *Westminster* on next after to shew if any thing she has or knows to say for herself why the said damages in the said action ought not to be assessed and to be recovered by the said *A. B.* according to the form and effect of the statute in such case made and provided, if it shall seem expedient, and so forth; and further to do and receive, &c. At which day *Ret. nihil.* before our lord the king at *Westminster* the said *A. B.* came by his attorney, and the sheriff of the county of *Middlesex*, to wit, and returned that by *F. G.* and *J. K.* good and lawful men of his bailiwick, he had made known to the said *E. D.* that she should be before our lord the king at the day and place contained in the said writ, to shew, and so forth, according to the tenor of the said writ, which said *E. D.* so summoned at that day, being solemnly required, came by her attorney, upon which the said *A. B.* prays that the said damages in the said action may be assessed, &c.

N O T E S.

1. *Per Car'*: Where the plaintiff sues out a *scire facias quare executionem non*, and the defendant pleads *nul tiel record*, the plaintiff cannot

sue out a new *scire facias*, unless he hath first quashed the first. *E. 13 G. 1. Hassell v. Mytton in B. R. M. S. Rep.*

Judgment
against a feme
sole who af-
terwards
married, and
then the Plain-
tiff brought
scire facias
against hus-
band and wife,
and had judg-
ment against
them, to have
execution, and
then the wife
died, the hus-
band shall be
liable. *Cartb.*
30.

2. A feme sole obtained a judgment in debt for 200*l.* and then married; afterwards the husband and wife brought a *scire facias* upon this judgment, to have execution thereof against the defendant in the original action, and they had judgment on the *scire facias*, (viz.) that the husband and wife *baheant executionem* against the defendant; then the wife died, and the husband in his own right brought another *scire facias* against the defendant, reciting the judgment in the original action, and the award of execution upon the first *scire facias*, (viz.) to have execution of the judgment, &c. To this the defendant demurred, and judgment was given in *C. B.* for the husband the plaintiff; and the question was, whether the award of execution on the first *scire facias* to husband and wife had vested such an interest in the husband to this debt, as to intitle him to it by right of survivorship after the death of his wife, as it doth where the husband and wife bring an action and obtain judgment against the debtor of the wife whilst sole. And adjudged, that the award of execution is attached in the husband by the judgment in the first *scire facias*, and shall survive to him. *T. 9 Will. 3. B. R. Cartb. 415.*

6 *Mod.* 134.
Administra-
tion by the
archdeacon of

3. *Scire facias* brought on a judgment in the queen's bench at *Westminster*, and the administrator

Dorset cannot intitle the plaintiff upon a judgment obtained at *Westminster*. For *per Cur'*: We that sit here, and hold the queen's courts, are bound to take notice under what ecclesiastical jurisdiction we are, and if so, we must see that we are not under the archdeacon of *Dorset*; and by consequence, an administration granted by him cannot intitle one to bring action upon our

ministrator produced administration by the arch-
 bishop of York; and because the judgment was
 assents at Westminster in the province of Canter-
 bury, the administration in the province of York
 did not extend to it. *E. 1 Ann. in B. R. 7 Mod. 15.*

our judgment: And archdeacons as such have no power to commit administration, though most in England do it, but not *quatenus* archdeacons, but by a prescriptive right, and sometimes they do by peculiars, and sometimes by themselves; and in those cases you must plead, *cui administratio in hac parte pertinet*. And here the administration is absolutely void, and so would it be if committed by the bishop, whose archdeacon this man is. And suppose, as it is urged, we cannot take notice but that the archdeaconry of Dorset is part of the diocese of London, yet at least we must take notice that the place where we sit here, is not of it: and the administration *quoad* this judgment is void.

Of proceedings against bail, in order to charge them, &c.] Before you can proceed against the bail, either by *scire facias* or action of debt on the recognizance, [except in error (a)] there must be a *ca. sa.* sued out against the principal, and *non est inventus* returned, and the writ filed (b) [Lutw. 1273.], for the bail are not bound to render the principal till they know what execution the plaintiff will chuse, *i. e.* whether he will have defendant's body, which appears by suing out the *ca. sa.* or whether he will have a *feri facias*, or an *elegit*.

And returned, and it may be filed at any time afterwards. *Per Cur. Lev. 225. Salk. 599, 602.*

There ought to be 8 days between the *teste* and the return of the *ca. sa.* against the principal; and in order to charge the bail, it must lie 4 days exclusive in the sheriff's office. See *Salk. 599, 602. 2 Ld. Raym. 1177.*

The present Practice of the

If the action be brought by original, the want of 15 days between the *teste* and return of a *copias* against the principal in order to charge the bail, is not helped by the *stat. 13 Car. 2. c. 2.*

NOTES.

1. If defendant gives judgment with stay of execution until a future day, plaintiff may sue out a *ca. sa.* or *fi. sa.* into the county where the action is laid, and returnable before that day, in order to make out a *testatum* against the defendant; but no such *ca. sa.* may be sued out to warrant a *scire facias* against the bail, unless by special agreement, it being to the prejudice of a third person.

2. If there be no *ca. sa.* sued out, returned and filed, the bail may plead it; but *Cur.* will not quash the *scire facias* on motion.

(b) Jones's
(Sr. Will.)
Rep. 136.

3. If defendant dies *after* a *ca. sa.* sued out, and *before* the return, the bail are discharged (b). But they must *plead* it. — But where the principal has died *after* a *ca. sa.* returned, and *before* it was filed, *Cur.* (on motion) has stayed the filing of it in favour of the bail. 1 Lill. P. Reg. 240. See *postea*.

2 Ld. Raym. 4. The principal died after the return of a 1452. Parry *ca. ad. satisfaciendum*, and before taking out a *scire facias* against the bail. *Cur.* refused to stay proceedings against them, for in strictness

In strictness of law the bail are bound from the return of law on a *non*

est inventus

returned on the *ca. sa.* awarded and filed, the bail are liable, though the principal should then die. *Mod. Ca. in Law and Eq.* 31. A *non est inventus* returned upon the *ca. sa.* the recognizance is forfeited, because there was a default in the party; and though it is usual to render the body

non est inventus, and it is but *ex gratia* that a body upon surrender after is accepted, which time they take the *scire facias*, yet that at their peril. (1 *Roll Abr.* 336.) *M.* 13 *G.* 1. is of grace, *Barry v. Barry*, *Str.* 717. If principal be alive not of necessity, and the when *ca. fa.* is returnable, and dies before it is ty, and the actually returned, the recognizance is forfeited. death of the principal at the time of the *scire factas* brought is not material, if he were alive when the *ca. fa.* was returned. *Cro. Jac.* 165. pl. 9.

5. A *ca. fa.* sued out against the principal returned and filed the very same day a writ of error was allowed, held good to charge the bail. 2 *Ld. Raym.* 1256. 2 *Str.* 867. *E.* 3 *G.* 2. *Sweetapple v. Goodfellow*, Held, that a writ of error is so absolutely a *superseas*, that the plaintiff cannot so much as take out a *ca. fa.* and return *non est inventus*, in order to proceed against the bail. — See *Fitz-Gibb.* 175. *Barnard. rep. in B. R.* 334.

6. The plaintiff in order to proceed against the bail, took out a *ca. fa.* on the 3d of Dec. on the 4th a writ of error was allowed, notwithstanding which he called for a return of *non est inventus*, and then waiting till the writ of error was at an end, proceeding by *scire facias* against the bail; and upon motion the whole proceedings were set a side, for the ground of them, viz. the return of *non est inventus*, was obtained after notice of the writ of error, which in its nature stopt all sort of proceeding, and the sheriff could not so much as look after the defendant in order to ground such a return upon. *E.* 16 *G.* 2. *Smith v. Nicholson*, *Str.* 1186. *Ld. Raym.* 342. *E.* 10 *W.* 3. *C. P. Ward v. Benda*, Held error sued on the principal judgment no bar to suing a *ca. fa.* to charge the bail. See *vide notes*, and also *Fitz-Gibb.* 175.

7. If a *ca. fa.* be sued out above a year after the judgment, without reviving the judgment by *scire facias*, yet good to ground a *scire facias* against the bail, for they are strangers, and cannot

not take advantage of that action in a collateral action. 2 *Ld. Raym.* 1096.

8. If an *original* be sued out in one county, and bail put in, and declaration laid in another county, though it be good against the *defendant*, yet the *bail are discharged*, and not liable to a *scire facias*; otherwise if *by bill*. 3 *Lev.* 235, 245.

Mr. D'Anvers
supposes
this is in-
tended where
the bail is
taken in exe-
cution; for it
is otherwise
where the bail
pays part;
and cites *Fol-
gate and Mole,*

9. If a man hath once execution against the bail of *I. S.* he shall never have execution against *I. S.* himself the principal, for he hath made his election by the first execution (a). *D'Anvers's Abr.* (G) 325. pl. 1.

So if he hath once sued out execution against the principal, he cannot after resort to an execution against the bail for the cause aforesaid. *Ibid.* pl. 2.

1 *Sid.* 107. (a) *Cro. Jac.* 320. S. C. and P. *per Cur'*. 2 *Bulst.* 68. S. C.

10. But he may have execution against one of the bail, and after have execution against the other also. *Ibid.* p. 3.

11. Without satisfaction to plaintiff he may always charge the bail. *Ibid.* pl. 4.

2 *Mod.* 312.
S. C. adjud-
ged. 2 *Jen.*
75. S. C. ad-
judged; tho'
by this book
it does not ap-
pear there
were more
than one de-
fendant,
whom the
plaintiff had
in execution.

12. *Scire facias* against the defendant, as bail for *A. B. C.* and *D.* The defendant pleaded that before the return of the second *scire facias*, the plaintiff took *A.* in execution upon a *capias*, and still detains him. *Per Cur'*: The bail have undertaken to bring in all the four principals, and therefore, though the plaintiff hath taken one, this doth not discharge the bail as to the other three; for they ought, as they took upon them, to bring in all the four; and gave rule for judgment for the plaintiff *nisi*, &c. by such a day;

1 *Vent.* S. C. adjudged. 3 *Keb.* 761, &c. S. C.

though

though *Jones* attorney pressed to be further heard. *T. 29 Car. 2. in B. R. Asty v. Ballard,* 2 *Lev. 195.*

13. If two become bail for one in *B. R.* and according to the course of that court they and each of them are bound in a recognizance, if he be condemned, to bring him in or answer the condemnation, or otherwise, that the debt shall be levied of their lands and chattels, and after judgment and *capias* against the principal, and *non est inventus* returned, a *scire facias* issues against the bail, and thereupon judgment is had, that the plaintiff shall have execution according to the form of the recognizance (a), he may (a) When one have a *capias* against one of the bail only, for died before the judgment in the *scire facias* is not to recover; any execution against them, but *quod habeat executionem*, and the recogni- *vide Skin. 82.* zance upon which it must be had was joint and — Where several, and so remains not altered by the judgment. *M. 19 Car. 2. between (b) Gee and his scire facias wife, and Sir Francis Fane, 1 Lev. 225. adjud- against both, plaintiff may have judgment against each, and execution against each. 1 Mod. Caf. 199. (b) 1 Sid. 339. S. C. adjudged, for the recognizance which was joint and several, remained so, and is not altered by the judgment. 2 Keb. 269, 274. S. C. (c) For this vide 1 Rol. Abr. 897. pl. 3. 904. pl. 6.*

14. Judgment by default on *scire facias* against bail, though the principal was in execution, and a *committitur* entred; yet the bail had no relief by motion, for they should have come in and have pleaded it upon the *scire facias*. *Skin. 120.*

15. Bankruptcy in the principal shall not avoid a judgment regularly obtained against the bail, on *stat. 5 G. 1. c. 22. Mod. Ca. in Law & Eq.*

Entering

Entering recognizance on the roll.] Before you sue out a *scire facias* against the bail, the declaration must be entered upon the rolls at *Westminster* of the same term the declaration was of, with an,

As yet of the term, &c.

And after the declaration is entered *verbatim*, you enter the defendant's appearance, and then the recognizance of the bail.

The entry of defendant's appearance.

AND the said C. D. by his attorney, comes and defends the force and injury when, and so forth.

Entry of the recognizance.

AND thereupon and (naming the bail with their additions) came into the court of our lord the king, before the king himself at *Westminster*, in their proper persons, and become pledges and manucaptors for the said defendant, and each of them became pledge and manucaptor for the said defendant, that if it should happen that the said defendant should be condemned in the plea aforesaid, then the said manucaptors granted, and each of them did grant, that as well the said debt, as all such

(a) Where the damages (a) as should be adjudged to the said demand is of

a debt certain, need say no more than *dampna* to include costs, except it be on taking a verdict on a trial where costs are to be mentioned; but upon *confes. nihil dic'* &c. it is never, or at least never need to be done.

Per Holt Ch. J. E. 1 Ann. in Atwood and Burr in B. R. 7 Mod. 4.

plaintiff

plaintiff in that behalf, should be made of their and each of their lands and chattels, and to be levied to the use of the said plaintiff, if it should happen, that the said defendant should not pay the said debt and damages to the said plaintiff, or render himself on that occasion to the prison of the marshal of the *marshalsea*, of our lord the king, before the king himself.

Of suing out a scire facias.] Vide p.

NOTE.

In a *scire facias* against bail, the plaintiff made a mistake in setting out the recognizance, which the defendant took advantage of by pleading *nul tiel record*, and afterwards the plaintiff moved to amend it, but was denied; for *scire facias's* against bail are never amended, and the course is for the plaintiff to *quash his own writ*. This may be to defeat the bail of an opportunity to surrender, which he would have done, if he could not have been sure of succeeding in his plea. *E. 15 G. 2. Grey v. Jefferson, Str. 1165.*

Into what county a scire facias against bail must issue.] On a recognizance taken in *B. R.* the action or *scire facias* against the bail must always be brought in *Middlesex* for the recognizances there are not obligatory by the caption, but by their being entered of record in the court, otherwise in the common pleas. *Salk. 564. 600, 659. See Style's Reg. Hob. 195, 196. Brownl. 69. Moor 883.*

But if bail be taken by a commissioner in the country, the *scire facias* may issue either into *Middlesex*, or into the county where taken. *Lutw. 1287.*

In

In case of bail on a writ of error, if the recognizance be entered to be taken at a judge's chambers in *London*, the *scire facias* may issue into *London*.

Return and teste of a scire facias against bail.
If a *scire facias* be brought against bail upon a recognizance on a writ of error generally, without expressing the action or the condition of the recognizance, there the *scire facias* must be returnable on a general return *ubicunque*. 2 *Lilly's Pract. Reg.* 449.

But if the action and the condition of the recognizance be set forth in the *scire facias*, and it appears to be by *bill*, then the *scire facias* must be returnable at a day certain in court, otherwise, it may be made returnable on a general return *ubicunque*, &c. 2 *Lilly's Pract. Reg. ibid.*

It was held, that if there be 15 days between the *teste* of the first and the return of the second *scire facias* against bail, it is sufficient, without any regard to the number of days between the *teste* and return of each. And that a *ca. sa.* may be taken out against bail, without any *fiert facias* or return of *nulla bona*. T. 13 G. 2. *Elliot v. Smith*, Str. 1139.

Scire facias against bail may bear *teste* the day of the return of the *capias ad satisfaciendum*. E. 3 G. 2. *Stewart v. Smith*, Str. 866.—Ld. Raym. 1567.—The first *scire facias* against bail ought to bear *teste* the day of the return of the *ca. sa.* and the second *scire facias* the day of the return of the first.

For more concerning the return of a *scire facias*, *vide p.*

Leaving

Leaving scire facias with the sheriff,] vide p.

Warning, &c.] vide p.

Return of scire facias by the sheriff,] vide p.

Where the bail appear.] If the bail appear to the *scire facias*, you deliver a declaration on treble *id.* stamp, give a rule to plead, and demand a plea, as mentioned *p.*

The form of a declaration.

Michaelmas term, &c.

Middlesex, OUR lord the king gave in charge Need not to wit, O to the sheriff of *Middlesex* his shew the term writ close in these words, to wit, *George* the nor year of the judgment in the declaration in *B. R.* second, &c. (and so the whole entry *verbatim* to otherwise in *C. B.* 2 *Ld.* the return *inclusive* of that writ on which bail *Raym.* 789. appears) and that the said *E. F.* and *G. H.* at that day having been solemnly required came by their attorney, upon which the said *A. B.* prays, that execution may be adjudged to him of the debt and damages afterwards, according to the form and effect of the said recognizance, and so forth.

Of staying proceedings against bail pending a writ of error brought by principal (a).] The (a) Matter plaintiff recovered judgment against the *principal*, and took out a *ca. sa.* and had a *non est inventus* returned: of this judgment error assignable by the bail. *Srr.* is brought, and two days after the plaintiff the bail. *Srr.* fues 197.

Note; Bail cannot bring error of the principal judgment, nor can the principal and the bail join in error. 1 *Lew.* 137. *Geo. Car.* 561, 575. 2. 1 *Sid.* 216.

sues out a *scire facias* against the bail, who now moved to stay the proceedings, upon the *scire facias*, as is done in cases where pending error the plaintiff brings an action of debt upon the judgment, insisting that it was more reasonable in this case, because otherwise the bail might lose the advantage of discharging themselves, by a surrender of the *principal*, which they can do at any time before the return of the second *scire facias*; and the court thought it reasonable, that the proceedings should be staid on the bail's consenting that if the judgment be affirmed, they would surrender the *principal*, or give judgment on the *scire facias*. *E. 7 G. 1. Myer v. Arthur, Str.* 419. I have seen a manuscript report of this case, which says, that the court staid the proceedings upon the *scire facias* against the bail till the determination of the writ of error upon the bail's undertaking to render the defendant, or pay the money if judgment be affirmed, within 4 days next after the affirmation thereof, and also agreeing to bring no bill in equity. See 1 *Mod. Ca.* 130.

Cur. will not stay proceedings against bail pending error till bail is put in upon the writ of error: Motion to stay proceedings against the bail pending error by the *principal* upon the terms it was done upon in *Myer v. Arthur*. But it appearing *here* that bail was not put in upon the writ of error, so as to make it an absolute *superseas*, the court refused it, saying, they would not go one step farther than the case of *Myer v. Arthur, M. 1 G. 2. Hunter v. Sampson and others, Bail of Yardly, Str.* 781.

Proceedings against bail not stay'd on error brought when the time of surrendering is lapsed. On the return of the second *scire facias* against bail

bail a four days rule was given, and on the fourth day the principal brings error. Motion to stay proceedings against the bail pending the writ of error. *Myer v. Arthur* and *Church v. Throgmorton in the house of lords*, where the house threatened to commit the attorney for proceeding against the bail pending error in parliament. As to the first case, the court said, it differed; for *there* the bail came in time, while they might surrender the principal, which they cannot do *here*, after the return of the second *scire facias*, at which time writ of error was brought; and as to the case in the house of lords, it was *there* agreed, that the court below could not restrain them; but the lords said they expected more respect. *Curia*: We can make no rule. T. 7 G. 1. *Everett v. Grey*, Str. 443. — T. 10 G. 1. *Alridge v. Snowden*, the bail did not move till both *scire facias*'s were out, and the rules upon them; and the court held they came too late. *Ibid*.

Per Cur. Where the bail do not apply to stay the proceedings pending error till their time to surrender is out, we will not give them any time for that purpose, but only four days to pay the money in, after the judgment is affirmed. T. 21 G. 2. *Richardson v. Jelly*, Str. 1270.

The second *scire facias* was returnable the first day of the term, and a week within term the bail moved to stay the proceedings on the common terms of giving judgment in the *scire facias*, and taking four days to surrender after affirmance in the principal cause. But *Cur.* held they came too late, after their time to surrender was gone, and would not revive it again; all they would do was, to stay the suing out execution till after affirmance. T. 4 G. 2. *Cole v. Buckland*, Str. 872.
After

After judgment on *scire facias* against bail, motion to stay execution, the principal having brought error, and the bail undertaking to pay the condemnation money, and the costs on the *scire facias* in four days after affirmance; but in *this case there being no bail on the writ of error*, the court made the bail undertake also to pay the costs on the writ of error, in case the judgment was affirmed, and said it was a favour they were asking, and they would make them submit to equitable terms. T. 4 G. 2. *Ritson v. Francis, bail of Nash, Str. 877.*

How much bail are answerable for, &c.] Formerly if the plaintiff declared for more than the process, the bail were discharged. Rule T. 22 Car. 2. But by a rule of court made E. 5 G. 2. no person being bail in court, or before a judge, shall upon a recovery against the defendant be answerable for any greater sum or sums, than are sworn to or indorsed on the writ or process on which the defendant was arrested, (*although part of the condition of the recognizance is to pay the whole condemnation money, if the defendant does not*) and if a greater sum be recovered, he shall not be discharged, but shall be liable for such sum or sums as shall be sworn due or indorsed, or any *lesser* sum that shall be recovered against the defendant in such action wherein he became bail, together with costs of suit.

The plaintiff out of the penalty of a recognizance of bail levied not only the money recovered, but some costs, not included in the judgment, but such as he had really been put to; and upon motion it was held, that, though equitable costs may be levied out of the penalty of a bond, yet it was too hard to suffer it to be
done

done against the bail, and so the overplus money was ordered to be returned. *Hil. 2 G. 2. Baldwin v. Morgan, Str. 826.*

Note; The bail in the original action, upon a writ of error brought are not liable to the costs upon the affirmance of the judgment, though they are liable for the debt and costs, or damages recovered in the *original* action, but the bail in error are answerable for the *whole*.

What time the bail have to render the principal where an action is brought on their recognizance.]

Bail sued in an action of debt on their recognizance shall have 8 entire days (a) *in full term* (a) If there next after the return of the writ of *latitat*, or are but 4 days other process sued out against them to render in term after the principal, and upon notice (b) thereof the return of the writ, 2. given to the plaintiff, or his attorney all farther If the bail proceedings against the bail on the recognizance shall not have shall cease. *Rule, T. 1 Ann.* four days in the following

term. See 1 *Ld. Raym. 721.* (b) The notice must be in writing.

As a plaintiff suing out a writ in a *plea of trespass* may declare (in *B. K.*) in any action he thinks fit, which may be a surprise on the bail, therefore by a rule of *Easter 15 G. 2.* it is ordered, that in all writs or process to be sued out upon any recognizance of bail after the words, "in plea of trespass," there shall be inserted the following clause, "and also to a bill of the said (the plaintiff) against the said (the defendant) in a plea of debt upon recognizance, according to the custom of our court before us to be exhibited," otherwise defendant or his attorney is not bound to accept of a declaration in debt upon such recognizance.

What time the bail have to render the principal after a scire facias is brought against them.] Where the bail are sued by *scire facias*, the defendant may render himself, or be surrendered by his bail at any time before the return of the first *scire facias*, if returned *scire feci*, or of the second *scire facias*, if the first be returned *nichil*, or even on the very day of the return of first *scire facias*, if returnable as above; or the second, if the first be returned *nichil, sedente curia*. But this is *ex gratia*, for upon *non est inventus* being returned on the *ca. sa.* against the principal, the bails recognizance is in strictness of law forfeited,

NOTES.

1. The bail pleaded in *scire facias* upon the recognizance, payment by the principal before the return of the second *scire facias* against the bail, plea bad; for in strictness of law the recognizance was forfeited by suing out of the first *scire facias* against the bail. 1 *Ld. Raym.* 157.

2. If the principal become bankrupt, the bail must surrender him before the return of the second *scire facias*. *Mod. Cas. in Law and Eq.* 348.

Where surrender may be.] Surrender may be in court, or before a judge at his chambers; but if the bail at any time after the return of the *ca. sa.* surrender the principal at a judge's chambers, and he thereupon is committed to the tipstaff, from whom he escapes, or is rescued, that will not be a good surrender, because it is an indulgence to the bail to surrender after a *capias* returned; *secus*, if it be before a *capias* returned,

turned ; for to surrender before or at the return of the *capias* is matter of right ; and now by rule of court, upon the first sort of surrender the principal ought to be *two* days in the marshal's custody, to make it a good surrender. 6 Mod. 239.

NOTES.

1. *The king's debtor may be brought up by his bail, and surrendered in a civil suit* : Boise and Sellers brought up by *habeas corpus* from Winchester gaol, were returned with two *civil* suits ; and several exchequer informations for frauds in the customs. Motion on behalf of the bail in the *civil* actions, that they might be at liberty to surrender, according to 25 E. 3. c. 19. The attorney general said, that the king has a prerogative to hold his debtor in what lawful gaol he pleased. (*Salk. tit. Ha. Cor'.*) However the court would never turn them over, till they were satisfied as to the reality of the debts : whereupon a reference was made to the master, and it appearing the next day on his report, that the *civil* actions were for just debts, and actually brought before any of the crown's informations, they were turned over to the marshal upon the surrender of the bail. M. 12 G. 1. *The case of the bail of Boise and Sellers, Str. 641.*

2. *Peter Vergen* was convicted for felony, and pardoned on condition of transportation ; and having also a *civil* action depending against him, in which he had given bail, the bail brought him up, and afterwards he is committed to a county gaol upon a suspicion of coining, *Cur'* (on motion) will grant an *hab. corpus* in order that defendant may surrender himself in discharge of his bail. M. S. Notes.

If a defendant be arrested, and puts in special bail, and judgment goes against

up by *habeas corpus*, in order to surrender him. Objected, the court could not take him out of the custody of the sheriff, and commit to the marshal. Answered, that upon the return of the writ he was to be considered as the prisoner of the court, who might do what they would with him, and send him back to *Newgate* for safer custody. So the bail were admitted to deliver him to the marshal, and the court immediately remanded him to *Newgate*. *M. 18 G. 2. Case of the bail of Peter Vergen, Str. 1217.*

3. Bail may take the principal on a Sunday and confine him till the next day, and then surrender him. *6 Mod. 231.*

Notice of surrender.] Where any defendant in any action here in court depending shall be rendered into the custody of the marshal of this court in discharge of his mancaptors, the defendant's attorney shall *without delay* give notice of such rendering to the plaintiff's attorney, and shall make affidavit thereof, before the bail in that action shall be *filed or discharged*; and in default thereof such rendering shall be void. *Rule, T. 1 Annæ.*

But if bail render the principal *at or before* the return of the *second scire facias*, it is good, though there be no immediate notice of it to the plaintiff, for the end of the notice in that case is twofold: one that the plaintiff may, if he pleases, charge defendant in execution; the other, that he be at no further trouble or charge in proceeding against the bail; but if, through want of notice, the plaintiff proceeds further against the bail, that shall not vitiate the surrender; but yet the bail shall not be delivered, till they pay such

such charges. *Per Cur. Mich. 3 Ann. 6 Mod.*
238.

If notice of the render has been given, and an affidavit made thereof, and the bail-piece discharged by the secondary and filed, no *scire facias* or other process ought to be sued out against the bail.

On principal surrendering himself, with whom the Reddedit se; &c. is to be left.] Where any person shall render himself in court, or before one of the justices of the court in discharge of his manucaptors, or shall be brought in court upon any writ of *babeas corpus*, or before one of the justices of the court, in order to be committed to the custody of the marshal of the court, such *reddidit se*, or writ of the *babeas corpus*, together with the return thereof, shall be left with the secondary or the judge's clerk before whom such person shall be rendered or brought, to be filed; and a copy or note of such rendering, or return of the writ of *babeas corpus* under the hand of such judge, or the secondary, shall be delivered to the marshal of this court at the time of the commitment of such person to his custody; and such copy or note shall be made and prepared by the person so rendering himself, or prosecuting such writ of *babeas corpus*, or by his attorney on his behalf. *Rule, T. 3 Ann.*

Of entering render in the marshal's book.] It is usual (a) to make an entry of the render in the marshal's book kept in the king's bench office. (a) Q. if this be absolutely necessary?
See Salk. 272.

Exoneratur.] When the principal is surrendered, get a certificate from the prison, that
U 3 the

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the defendant is in custody, and thereupon the *master* will discharge the bail-piece; for till that is discharged, the bail are liable.

After the bail-piece is discharged, file it with Mr. Hebbarden, pay 4*d.*

If the bail-piece be *filed* without being first discharged by the *master*, the bail remain liable, though the defendant be actually in prison. See *Salk.* 98. *Mod. Cases in Law and Eq.* 282, 340. *Cartb.* 516.

A scire facias against bail in debt.

GEORGE the second, by the grace of God, of Great Britain, France and Ireland king, defender of the faith, and so forth, to the sheriff of Middlesex, greeting. Whereas *A. B.* lately in our court before us at *Westminster*, by bill, without our writ, and by the judgment of the same court, recovered against *C. D.* (a) pounds

(a) Add his addition and the *alias dict'*, if any.

(b) If the judgment be in case on promise, say, recovered against *C. D.*

— pounds for his damages which he sustained

as well by occasion of the not performing certain promises and undertakings lately made by the said *C. D.* to the said *A. B.* as for his costs and charges by him about his suit in that behalf expended, &c. You omit the word *debt* throughout. If in *trespass*, say, recovered against *C. D.* — pounds for his damages, which he sustained as well by means of a certain *trespass* lately done by the said *C. D.* to the said *A. B.* as for his costs, &c. (c) Naming the bail with their additions.

said court before us at *Westminster* came personally, and became pledges and bail, and each of them by himself became pledge and bail, for the said *C. D.* that if it should happen the said *C. D.* should be condemned in the plea aforesaid, then they the said bail granted, and each of them for himself did grant, that as well the said debt, as all such damages, costs and charges as should be adjudged to the said *A. B.* in that behalf, should be made of their and each of their lands and chattels, and to be levied to the use of the said *A. B.* if it should happen, that the said *C. D.* should not pay the said debt and damages, costs and charges to the said *A. B.* or should not render himself on that occasion to the prison of the marshal of our *marshalsea* before us; nevertheless the said *C. D.* has not as yet paid to the said *A. B.* the said debt and damages, costs and charges, nor surrendered himself to the prison of the marshal of our *marshalsea* before us; as we have understood from the information of the said *A. B.* in our court before us; whereupon the said *A. B.* hath humbly intreated us, that he may have a proper remedy in this case; and we being willing that what is just should be done on this occasion, command you, that by good and lawful men of your bailiwick you make known to the said *E. F.* and *G. H.* that they be before us at *Westminster* on next after to shew if any thing they have or know to say for themselves why the said *A. B.* ought not to have his execution against them, according to the force, form and effect of the said recognizance, if it shall seem expedient, and so forth; and further to do and receive all and singular those things, which our said court before us shall then and there consider of them in this behalf, and that you have

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there then the names of those by whom you shall make known to them, and this writ. Witness, &c.

Lee and Antonie.

Scire facias against one of the bail in an action of debt.

GEORGE the second, &c. To the sheriff of *Middlesex*, greeting. Whereas *A. B.* gentleman, lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against *C. D.* esq; otherwise called, &c. (*as in the bond*) pounds for a debt, and also shillings for his damages, which he had sustained, as well by occasion of the detaining his said debt, as for his expences and costs laid out by him about the prosecution of that suit, whereof the said *C.* is convicted, as appears to us of record; and although judgment be given thereof, nevertheless execution of the said debt and damages remains to be made to him; and whereas *E. F.* of, &c. heretofore, that is to say, in the term of *St. Michael* in the year of our reign, personally came before us at *Westminster*, and became a manucaptor and pledge for the said *C.* that if it happened, that the said *C.* should be convicted at the suit of the said *A.* in the said action, then he the said manucaptor granted, that as well the said debt, as all such damages, expences and costs which should be awarded to the said *A.* in that suit, should be made of his lands and chattels, and levied to the use of the said *A.* if it should happen the said *C.* should not pay the said *A.* the said debt, damages, expences and

and costs, or should not render his body to the marshal of our prison of the *marshalsea* before us; which said debt and damages, expences and costs are not paid to the said *A.* nor hath the said *C.* rendered himself to our prison of the marshal of the *marshalsea* before us, as we have received information from the said *A.* in our said court before us; wherefore the said *A.* hath besought us to provide him a proper remedy in this particular; and we being willing, that what is right and just should be done to him in this case, we command you, that by honest and lawful men of your bailiwick you cause it to be known to the said *E. F.* — (*the bail*) that he be before us at *Westminster* on — next after, *Ec.* to shew if he has or knows of any thing to say for himself why the said *A.* ought not to have his execution against him for the said debt and damages, according to the force, form and effect of the said recognizance, if it shall seem expedient to him so to do; and further to do and receive what our said court before us shall consider of in this behalf; and have you there at the same time the names, *Ec.* Witnesses *Wm. Lord Mansfield* at *Westminster*, the day of in the year of our reign.

Lee and Antonie.

Scire

Scire facias *against bail on a recognizance in case. Plea by one defendant no ca. fa. and by another defendant a fieri facias executed; replication a ca. fa. sued out; and no fieri facias sued out, and issue.*

Michaelmas term in the year of king
George the second.

See Lilly's
Ent. 395.

Middlesex, OUR lord the king gave in charge to wit. (or sent) to the sheriff of *Middlesex* his writ close in these words, to wit, George the second, by the grace of God, king of Great Britain, France and Ireland, defender of the faith, &c. To the sheriff of *Middlesex*, greeting. Whereas *E. F.* lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against *B. R.* pounds for her damages, which she sustained as well by means of the non-performance of certain promises and undertakings lately made by the said *B. R.* to the said *E. F.* as for her costs and charges by her about her suit in that behalf expended, whereof the said *B. R.* was convicted, as appears to us upon record; and now on the behalf of the said *E. F.* in our said court before us we have been informed, that, although judgment be thereupon given, yet execution of (or for) the said damages still remains to be made to her; and whereas also *T. Bartley* of, &c. *W. H.* of, &c. *W. I.* of, &c. *P. F.* of, &c. *C. C.* of, &c. *C. B.* of, &c. *T. F.* of, &c. and *T. Baker* of, &c. heretofore, to wit, of the term of *St. Hilary* in the year
of

of our reign, in our same court before us at *Westminster* personally came, and became pledges, and each of them by himself became pledge, for the said *B. R.* that if it should happen, that the said *B. R.* should be condemned in the said action, then they the said *T. Bartley, &c.* (*naming all the bail*) granted, and each of them by (*or for*) himself granted, that all such damages, costs and charges, as should in that behalf be adjudged to the said *E. F.* should be made of their and each of thir lands and chattels, and be levied to the use of the said *E. F.* if it should happen, that the said *B. R.* should not pay the said damages, costs and charges to the said *E. F.* or should not render himself on that occasion to the prison of the marshal of our *marshalsea* before us: nevertheless the said *B. R.* has not yet paid the said damages, costs and charges to the said *E. F.* nor surrendered himself on that occasion to the prison of the marshal of our *marshalsea* before us, as on the information of the said *E. F.* in our said court before us we have been given to understand; whereupon the said *E. F.* hath prayed us, that a proper remedy may be provided for her in this behalf, and we being willing, that that which is just should be done in this case, we command you, that by good and lawful men of your bailiwick you make known to the said *T. Bartley, &c.* (*here name all the bail*) that they be before us at *Westminster* on *Monday, &c.* (*the return*) to shew if they have or know any thing to say for themselves why the said *E. F.* ought not to have her execution against them the said *T. Bartley, &c.* of (*or for*) the damages aforesaid; according to the force, form and effect of the said recognizance, if it shall seem expedient, and so forth; and further to do and receive all and singular

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singular those things which in our said court before us shall then and there be considered of them in this behalf; and have there the names of those by whom you shall make known to them, and this writ. Witness *Wm. Lord Mansfield*, at *Westminster*, the day of in the

year of our reign. At which day before our lord the king at *Westminster* the said *E. F.* came in her proper person, and the sheriff of *Middlesex*, to wit, and

Nichil returned.

Alias scire facias awarded.

Two of the bail appear.

Nichil returned.

Six of the bail make default.

sheriff of the said county of *Middlesex*, returned, that the said *T. Bartley, &c.* (*naming all the bail*) had nothing, nor had either of them any thing in his bailiwick, whereby he could make known to them or either of them, neither were they, nor was either of them found in the same, and they came not, nor did either of them come; therefore, as before, it is commanded to the sheriff, that by good and lawful men of his bailiwick he make known to the said *T. Bartley, &c.* (*naming all the bail*) that they be before our lord the king at *Westminster* on *Tuesday, &c.* (*the return*) to shew in form aforesaid, if, and so forth, and further, and so forth. The same day is given to the said *E. F.* there, and so forth. At which day before our lord the king at *Westminster* came as well the said *E. F.* in her proper person, as the said *I. F.* and *T. Baker* in their proper persons; and the sheriff as before returned, that the said *T. Bartley, &c.* (*naming all the bail*) had nothing, nor had either of them any thing in his bailiwick, whereby he could make known to them, or either of them, neither were they, nor was either of them found in the same; and the said *T. Bartly, W. H. W. I. P. T. C. C.* and *C. B.* although at that day solemnly required, came not, nor did either of them come, but made default; upon which the said

said *E. F.* prayed, that her execution against the said *T. Bartley, &c.* (naming all the bail) of (or for) the damages aforesaid, according to the force, form and effect of the said recognizance, might be adjudged to her, &c. and the said *I. F.* in his proper person comes and says, that the said *E. F.* ought not to have her execution against him of (or for) the damages, costs and charges aforesaid, by pretence of the said recognizance, because he says, that after the said judgment against the said *B. R.* at the suit of the said *E. F.* was given in form aforesaid, and before the issuing forth of the said first writ of our said lord the king of *scire facias* against the said *I. F.* as bail of the said *B. R.* at the suit of the said *E. F.* no writ of *capias ad satisfaciendum* upon that judgment by the said *E. F.* against the said *B. R.* was in due manner sued forth, returned and filed (a) in the court of the said lord the king now here, of record, which, according to the custom of that court from the time whereof the memory of man is not to the contrary used and approved in the same, ought to have been done before any writ of *scire facias* against the said *I. F.* as bail as aforesaid, ought to have issued forth; and this he is ready to verify; wherefore he prays judgment whether the said *E. F.* ought to have her execution against him the said *I. F.* of (or for) the damages, costs and charges aforesaid, by pretence of the said recognizance, and so forth (b); and the said *T. Baker* says, that the said *E. F.* ought not to have execution against him of the damages aforesaid; because he says,

One of the bail who appeared, pleads no *ca. fa.* sued out against the principal,

(a) See before

The other bail pleads *fieri facias* executed on the goods of the principal.

(b) *Scire facias* against bail; they pleaded no *ca. fa.* and concluded to the country; and the plea was held ill by all on demurrer, for that reason. *M. 1 Ann. Snow v. Bail of Firebrass, 2 L. Raym. 804. 2 Salk. 439.*

that

that after the giving the said judgment, and before the issuing the said first writ of *scire facias*, to wit, in term in the year of the reign of our lord the now king, the said *E. F.* for the obtaining the damages aforesaid prosecuted *from* (or *out of*) the court here, of and upon the said judgment a certain writ of our lord the king of *fieri facias* directed to the sheriff of the county of *Surry*, against the said *B. R.* by which writ it was then commanded to the same sheriff, that of the goods and chattels of the said *B. R.* in his bailiwick he should cause to be made the damages aforesaid, and that he should have that money here on next after then next following, to render to the said *E. F.* for the damages aforesaid; which said writ afterwards and before the return thereof, to wit, on the day of in the year aforesaid at *Croydon* in the said county of *Surry*, was delivered to one esq; (the said then, and until, and after the return of the said writ being sheriff of the said county) by virtue of which said writ the same sheriff afterwards and before the return thereof, to wit, on the day of in the year aforesaid at *Croydon* aforesaid, caused the said damages to be made of the goods and chattels of the said *B. R.* in his bailiwick; and this he is ready to verify; wherefore he prays judgment, whether the said *E. F.* ought to have her execution against him of the damages aforesaid, &c.

Replication as to the *ca. fa.* that one was sued out, And the said *E. F.* as to the plea of the said *I. F.* says, that she by any thing by the said *I. F.* above in pleading alledged ought not to be barred or hindred from having her said execution against him for the damages aforesaid, by virtue of the said recognizance, because she says, that after

after the said judgment against the said *B. R.* at the suit of the said *E. F.* was given in form aforesaid, and before the issuing forth of the said first writ of our said lord the king of *scire facias* against him the said *I. F.* as bail of the said *B. R.* at the suit of the said *E. F.* to wit, on the day of in the year of the reign of our sovereign lord the now king, and so forth, she the said *E. F.* at *Westminster* in the county of *Middlesex* obtained and sued forth out of the court of our said lord the king, being before the king himself, the same court being then and there at *Westminster* aforesaid, a certain writ of our said lord the king of *capias ad satisfaciendum*, for the damages, costs and charges aforesaid, upon the said judgment against the said *B. R.* directed to the then sheriffs of the city of *London*, by which said writ our said lord the king commanded the said then sheriffs, that they should take the said *B. R.* if he would be found in their bailiwick, and safely keep him, so that they might have his body before our lord the king at *Westminster* on next after then next following, to satisfy the said *E. F.* for the said pounds for the damages, costs and charges aforesaid upon the said judgment against the said *B. R.* at which day the said *E. F.* being in her proper person in the court of our said lord the king before the king himself, (the said court being then and there at *Westminster* aforesaid) the said sheriffs of *London*, to wit esq; and esq; at that day returned to our said lord the king, and returned that the said *B. R.* was not found in their baili-^{non est inventus.}wick, as by the said writ of *capias ad satisfaciendum*, and the return thereupon, remaining filed on record in the said court of our said lord the king before the king himself at *Westminster* aforesaid,

Replication as
to the *feri fa-*
cias, that none
was sued out.

Continuance
of the first
issue by *curia*
advisare
vult.

Venire
awarded.

said, among the file of writs of *capias ad satisfaciendum* of the said court may more fully appear; and this she is ready to verify by that record, and so forth; and she prays, that the record of the said writ and the return thereupon by the court of our lord the king now here may be seen and inspected, and so forth. And the said *E. F.* says, that she by any thing by the said *T. Baker* above by pleading alledged ought not to be barred or delayed from having her execution for the said damages against him the said *T. Baker*, because she says, that she the said *E. F.* has not at any time hitherto, for the obtaining the said damages, prosecuted out of the court here of and upon the said judgment any writ of our lord the king of *feri facias*, directed to the sheriff of the county of *Surry* against the said *B. R.* as the said *T. Baker* has above by pleading alledged; and she prays, that this may be inquired of by the country, and the said *T. Baker* thereupon doth the like, and so forth. And because the court of our lord the king now here is not yet advised what judgment to give as well of and concerning the premisses against the aforesaid *T. Bartley*, *W. H. W. I. P. T. C. C.* and *C. B.* for that they have made default as of and concerning the premisses between the said *E. F.* and the said *I. F.* above pleaded, a day is given as well to the said *E. F.* as the said *I. F.* that they be before the lord the king at *Westminster* on next after to hear their judgment thereon, because the said court of our said lord the king now here is not yet advised thereof. And as to the trying the issue above joined between the said *E. F.* and the said *T. Baker* to be tried by the country, the sheriff is commanded, that he cause to come before

before our lord the king at *Westminster* on, &c. twelve, and so forth, by whom, and so forth; and who neither, and so forth, to recognize, and so forth, because as well, and so forth. The same day is given as well to the said *E. F.* as to the said *T. Baker* there; and so forth. At which day before our lord the king at *Westminster* came as well the said *E. F.* in her proper person, as the said *I. P.* and *T. Baker* in their proper persons; but because the court of our said lord the king now here is not yet advised what judgment to give as well of and concerning the premisses against the aforesaid *T. Bartley, W. H. W. I. P. T. C. C.* and *C. B.* for that they have made default as of and concerning the premisses between the said *E. F.* and the said *I. F.* above pleaded, a day is given as well to the said *E. F.* as to the said *I. F.* that they be before the lord the king at *Westminster* on next after to hear their judgment thereon, because the said court of our said lord the king now here is not yet advised thereof; and as to the trying the issue above joined between the said *E. F.* and the said *T. Baker*, to be tried by the country, the sheriff returned the said writ in all things served and executed, together with a panel of the names of the jurors, of whom none, and so forth; therefore the sheriff is commanded, that he distrain the said jurors by all their lands, and so forth, and that of the profits, &c. so that he may have their bodies before our lord the king at *Westminster* on the same day, or before the king's right trusty and well beloved *Wm.* lord *Mansfield*, his chief justice assigned to hold pleas before the king himself, if he shall first come on next after at *Westminster* aforesaid,

18 *El. c. 12.* aforeſaid, at the great hall of pleas there, ac-
 12 *G. c. 13.* cording to the form of ſtatute in ſuch caſe made
 and provided, for default of the jurors, be-
 cauſe none of them did appear; therefore let
 the ſheriff have the bodies, and ſo forth. The
 ſame day is given as well to the ſaid *A. B.* as
 to the ſaid *T. Baker* there, and ſo forth.

*Entry on the roll of two ſcire facias's againſt
 bail and judgment by default.*

Middleſex, OUR lord the king gave in charge
 to wit, **O** (or ſent) to the ſheriff of *Middleſex*
 his writ cloſe in theſe words, to wit, *George* the
 ſecond, &c. (inſert the whole writ *verbatim* to)
 Witneſs knt. (naming the chief juſtice) at
Weſtmiſter the day of in the
 year of our reign. At which day the aforeſaid
A. B. in his proper perſon came before our lord
 the king at *Weſtmiſter*, and the ſheriff, to wit,
 (here inſert the ſheriff's name) ſheriff of
 the ſaid county of *Middleſex*, at that day returned,
 that the ſaid *E. F.* and *G. H.* had not, nor had
 either of them any thing in his bailiwick, where
 or by which he could make known to them or
 either of them, neither were they nor was either
 of them found in the ſame, and the ſaid *E. F.*
 and *G. H.* came not, nor did either of them
 come; Therefore, as before it is commanded
 to the ſheriff, that by good, and ſo forth, he
 make known to the ſaid *E. F.* and *G. H.* that
 they be before our lord the king at *Weſtmiſter*
 on next after to ſhew in
 form aforeſaid, if, and ſo forth, and further, and
 ſo forth. The ſame day is given to the ſaid
A. B. there, and ſo forth, at which day the afore-
 ſaid

saïd *A. B.* came in his proper person before our lord the king at *Westminster*, and the saïd sheriff returned (*as before*) and the saïd *E. F.* and *G. H.* although at that day solemnly required, [or demanded] came not, nor did either of them come, but made default. It is therefore considered, that the saïd *A. B.* have his execution against the saïd *E. F.* and *G. H.* of the debt and damages (*a*) (*a*) As the aforesaid, according to the force, form and effect case is. of the saïd recognizance, &c.

Nonpros, nonsuit.

ON process returnable *at a day certain*, if plaintiff does not declare either of the term the writ is returnable, or before the end of the *ensuing* term, and defendant has appeared by his attorney, and filed common bail of the term wherein the process is returnable, he may sign a nonpros, without entring any rule to declare or calling for a declaration, and the defendant shall have costs taxed as usual. *Stat. 13 Car. 2. c. 2. sect. 3.* And if declaration should be tendred at any time after the end of the second term, and before the nonpros is signed, defendant is not bound to accept of it, but may sign his nonpros at any time after the end of the second term. But if the matter should be under accommodation, or any thing should prevent plaintiff's declaring within 2 terms, he may get a side-bar rule from the clerk of the rules for further time to declare, (if defendant be not in custody) and must serve defendant's attorney with a copy thereof.

If the proceedings are by *original*, defendant must before the end of the second term, or

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within 4 days after enter a rule for plaintiff to declare, and demand a declaration in writing.

And if plaintiff does not declare before the rule is out, defendant may at any time, before the effoin day of the next term, sign a nonpros, but not afterwards.

N O T E S.

1. Plaintiff ought to pay the costs of *one* nonsuit only, where a *latitat* was awarded against four defendants, though they appeared *severally* by different attornies, where the nonsuit was for not declaring against them in two terms. For *per Holt C. J.* though the plaintiff might declare against them *severally*, yet as the writ was awarded against them *jointly*, and the plaintiff was nonsuited before any declaration, there ought to be but *one* nonsuit for all of them. *T. 12 W. 3. in B. R. Comyns 74.*

2. *Ballard* caused *A.* to be arrested, who pretended *privilege*, and the attorney durst not proceed. Two terms after they got leave to proceed, and then the defendant's attorney would not accept of a declaration, because two terms were past. *Cur'*: The delay being occasioned by the defendant's protection, we will compel him to accept a declaration. *M. 29 Car. 2. M. S. rep.*

3. After a nonpros plaintiff may hold defendant to special bail in a second action, for plaintiff paying costs in the first action, shall not be in worse condition than before. *T. 7 G. 1. Turton v. Hayes 1 Str. 439.*

4. If plaintiff be nonsuit, and judgment against him for costs, error lies in the exchequer chamber. *Str. 235.*

Proceedings by attornies.

Of suing out an attachment of privilege (a).] Write this writ on a 2s. stamp, add an *English* notice as for a *latitat*, and serve defendant with a copy if the action be notailable.

(a) If an attorney sues by original, he waives his privilege. 2 Str. 837. 2 Lev. 39.

If the action isailable, insert an *ac etiam* in the same manner as in a *latitat*, make a *præcipe* (b), sign the writ with Mr. *Haberdine*, pay nothing unless the action isailable, and then 1s. for swearing affidavit, sealing 7d.

(b) By rule Hil. 20 G. 2. an attorney suing out an

attachment of privilege against any defendant, is to leave a *præcipe* with the signer of the writs with the defendant's name, not exceeding four in each writ, with the return and day of signing and the agent's or attorney's name who sued out the same, and such *præcipes* to be entred on the roll the *præcipes* of *latitats*, &c. are entred.

Appearance.] If defendant appears, he files his bail with Mr. *Heberdine*, pay him

Declaration.] Ingross declaration on treble 1d. stamped paper.

When defendant must plead.] If an attorney delivers or files his declaration, and gives notice thereof *four days exclusive* before the end of the term in which the attachment was returnable, defendant must plead as of that term, if rule to plead be given and plea demanded. But if he does not deliver his declaration in that time, defendant will have an imparlance, and if he does not deliver or file his declaration before the effoin day of the subsequent term, defendant will have an imparlance to the next term following.

Præcipe for an attachment of privilege.

Draw a line
under defen-
dant's name,
if the action
is bailable.

London. **A**ttachment of privilege for *A. B.*
gent. one, &c. against *C. D.*

R. S.

20th of

ret. &c.

1760.

Attachment of privilege.

You may put
four defen-
dants in this
writ, but no
more. See

Rule Hil. 20
G. 2. —

This writ is
only as a *lati-*
tat, and not as
an *original*.

1 *Show.* 367.

(a) Here in-
sert an *ac*
etiam if the
action is bail-
able, for if it
is, there must
be an *ac etiam*
billæ, by *stat.*

12 *G. 1. c. 29.*

f. 1. 2. 5 G. 2.

c. 27. 13

G. 2. c. 18.

GEORGE the second, &c. to the sheriff of
Middlesex, greeting. We command you,
that you attach *C. D.* if he may be found in your
bailiwick, and safely keep him, so that you may
have his body before us at *Westminster* on, &c.
[the return] to answer *A. B.* gent. being one of
the attornies of our court before us, according
to the liberties and privileges for such attornies
and other ministers of the same court from the
time whereof the memory of man is not to the
contrary used and approved in the same, of a
plea of trespass (a) and that you have there
then this writ. Witness, &c.

Indorse the attorney's
name and the day of
the month the writ
was sued out.

Lee and Antonie.

Proceedings against attornies.

You must not arrest an attorney, whatever
may be the cause of action, he being al-
ways supposed to be in court; but you must
proceed against him as follows.

Note; An attorney cannot have his privilege but where he sues or is sued singly, and in his own right, or on his own account, and not where he sues or is sued *jointly*, or *in autre droit*, as executor, &c.

Bill.] Draw a bill against him, write one copy thereof on treble 1 d. stamped parchment, and another on treble 1 d. stamped paper.

Of filing and delivering the bill.] File the parchment copy with the clerk of the declarations in the king's bench office, pay him 4 d. deliver the copy wrote on treble 1 d. stamped paper to defendant, or leave the same at his place of abode with notice indorsed to plead.

Of rule to plead and demanding plea.] Give a rule to plead, and demand plea as in common cases.

When to plead.] If a bill is filed against an attorney, and a copy thereof delivered 4 days *exclusive* before the end of the term, -[including *sunday* as one] he must plead as of that term, plaintiff having given a rule to plead, and demanded a plea. — But if the bill be not filed, and a copy delivered within the time aforesaid, defendant shall have an imparlance.

Issue.] If defendant appears and pleads in time, you make up the issue with a memorandum as in other cases.

Judgment by default.—*Writ of inquiry.*—*Execution.*] If defendant don't appear and plead according to notice, you don't forejudge him, as in the common pleas, but you sign interlocutory judgment, if the action is *case*, &c. and execute a writ of inquiry, and thereupon proceed to final judgment and execution as in other cases. But if the action be in *debt*, the first judgment is final, and you may immediately take out what execution you please.

NOTES.

1. Whether a man be an attorney or not, must be tried by record. *Str.* 76.

2. Replication that plaintiff is not an attorney, must not conclude to the country. *Str.* 532.

3. An attorney of C. B. who is *actually* in the custody of the marshal, shall never be suffered to plead his privilege, for there is a great difference between an *actual* and a *supposed* custody. *Per Cur'. T. 5 G. 1. Windmill v. Cutting, 1 Str. 191.*—For if he should, there would be a failure of justice. *Per Cur'. See Carth. 378.*

4. The sheriff of *Middlesex* moved to discharge a rule to return his writ, upon affidavit that defendant was a *menial* servant of the lord *Say and Seale*, who had claimed him upon his being arrested, and upon which the sheriff had discharged him; but it appearing defendant was an attorney, and that it was a standing order of the house of lords (a), that no common attorney or solicitor, though employed by a peer, shall have privilege, the court refused the motion, and

(a) 24 March
1696.

and ordered the sheriff to return his writ. *M.*
10 G. 2. *Wickham v. Hobart*, 2 Str. 1065.

5. Defendant pleaded the privilege of C. B. plaintiff moved to set it aside, he suing as an attorney of B. R. upon the foot of privilege taking away privilege; but *Cur.* said, that was a point of law which they would not determine on a motion, but put the plaintiff to demur to it. *N. B.* This was moved again next term, and the declaration was produced, by which it appeared the plaintiff sued by original, which was held a waiver of his privilege (a). *T.* 3 G. 2. (a) 2 Lev. 39. *Helberington, one, &c. v. Lowth*, 2 Str. 837. S. P. and

when an attorney sues by original, he must declare as others do in common form. *Ibid.* But if an attorney of C. B. be brought into the court of B. R. at the suit of an attorney there, this is an estoppel to the defendant's privilege; even in such case the defendant shall be ousted of his privilege in all other actions commenced against him in B. R. in the same term, because the jurisdiction of this court was attached upon him by the first action. *Per Cur.* *E.* 8 W. 3. in *B. R.* in the case of *Bands v. Bodinner*, *Carth.* 377.

6. An attorney of C. B. must plead his privilege in B. R. and cannot be discharged on common bail (b). *E.* 3 G. 2. *The Mayor of* (b) If an attorney of C. B. be sued in *Basingstoke v. Bonner*, 2 Str. 864.

B. R. he doth not waive his privilege by filing bail, but may plead it to that action, or any other action, on a declaration filed against him in the same term by the By. But if he pleads in chief to the first action, he thereby waives his privilege, and a waiver of privilege in a prior action depending in B. R. is a waiver of privilege in all other actions commenced in that term. *Carth.* 378.

7. Held *per Cur.*, that if plaintiff and defendant are both attornies (c), the defendant must (c) I suppose be sued by bill; and that the plaintiff cannot take of the same court out an attachment, and hold the defendant to bail, as he does in the case of a common person; this case

The present Practice of the

case therefore is an exception out of the general rule, that privilege takes away privilege. *M. 14 G. 2. Railiffe, one, &c. v. Besley, 2 Str. 1141.*

8. The defendant pleads his privilege that he is an attorney of C. B. and ought to be impleaded there, &c. Plaintiff demurs, and objected, that defendant should have brought in his writ of privilege under seal, according to the precedent in *Rastall*, tit. *Privilege* 472. b. But *per Cur'*: He may take advantage of his privilege by *plea* or *writ*. *E. 26 Car. 2. Lawson v. Cupps in B. R. M. S.*

Ca. in B. R. temp. Will. 3. 163. S. Points. See Salk. 544.

9. A person privileged in court shall not have an *imparlance*, neither can a bill be filed against him *in vacation*, but it must be filed *sedente curia*; and if there be a *joint* cause of action against an attorney and another person, you cannot declare as against one *in custodia*, and the other by bill, but against both as *in custodia*; and the same practice holds in C. B. You must proceed there by original against both. *Comb. 465.*—For an attorney cannot have his privilege, but where he sues or is sued *singly*, and in his own right, or on his own account.

The form of a bill against an attorney.

Middlesex. *A.* B. complains of C. D. gent. one of the attornies of the court of our lord the king before the king himself, being present here in court in his proper person, for that, to wit, that whereas (*the rest as in other declarations*) and thereupon he brings suit, and so forth.

R. S.

R.S. for the plaintiff. }
The defendant in } Pledges, &c. } John Doe,
person. } Richard Roe.

(a) Of term in the year of the (a) Note; On
reign of our sovereign lord George the second, &c. the copy,
which you
deliver to defendant, Of, &c. is wrote at the top as in declarations.

Proceedings by original. (b)

In what cases necessary.] Peers of this realm must be sued by original, and so must bodies corporate; and hundredors on the stat. of hue and cry must be proceeded against in this court by original only.

No *quare impedit*, writ of right, replevin, and such like, come into B. R. but either by original writ, or else by being removed from inferior courts by writs, which are in their nature original writs, and returnable *coram nobis ubicunque*, &c. as writs of *recordari facias loquelam*, *accedas ad curiam*, *certiorari*, writs of error, &c.

Proceeding by original is of use in outlawing defendants that conceal themselves, and cannot be arrested.

No writ of error lies on a judgment by original but in parliament.

How to proceed against peers, &c.] If defendant be a peer of the realm, or a body corporate, the sheriff is to summons the party on the original, and if the defendant does not appear, the filazer makes out a *distringas* against the defendant's lands and chattels; whereupon the sheriff returns issues to the value of, &c. whereupon you have an *alias distringas* and *pluries distringas*

(b) A bad original is not helped by a verdict, but the want of an original is, though plaintiff in his declaration recite an original. See 1 Mod. 3.

disfringas ad infinitum, till the defendant does appear; and if the sheriff return but *small* issues, the court on motion will order him to return better, and these issues are to be estreated into the exchequer, and levied on the defendant's lands and chattels to the king's use by way of forfeiture.

Of suing out an original and capias thereon.]
Draw a præcipe thus;

Præcipe for an original.

Note; The original issues out of chancery, and is made out by the curitor of the proper county, and is not in general cases served on the defendant, except it be against a peer or body corporate, it being only a warrant for

Middlesex. IF *A. B.* shall give you security to prosecute his suit, then put by sureties and safe pledges *C. D.* late of *Westminster* in the county of *Middlesex*, esq; (*a*) that, &c. to shew, that whereas (here set forth the whole count or declaration *verbatim*) to the damage of the said *A. B.* of *l.* as he says.

R. S. attorney.

of 1760.

Affidavit for *l.*

Ret. before our lord the king on, &c. (a general return) Wherefore, and so forth.

the *capias*. 2. if an original may be made returnable in *B. R.* in any action of (*) *debt*, *detinue*, *account* or *covenant*. (*) See *Carth.* 234. (4) By the stat. of additions 1 *H. 5. c. 5.* the count or declaration must set forth the defendant's estate, or degree or mystery, and the town, or hamlet or place and county where he is or was conversant. *Late commorancy* is a good addition: The defendant was sued by a special original with the addition of *nuper de London merchant*: the defendant pleaded, that for four years before he was commorant at *White-chapel in Middlesex*, and traversed, that at the time of the writ *vel nuper tunc vel unquam postea*, he was of *London*; and made affidavit, that the contents of his plea was true; and *Theobald's Digest*, lib. 6. was cited. But upon motion the plea was set aside, for by 1 *H. 5. c. 5.* the plaintiff has his election to name him of the place he was lately commorant in, and so is 19 *H. 6. 1. Hil. 5 G. 2. Certifos v. Munoz, Str.* 924.

Carry

Carry the *præcipe* to the filazer, who will make out the *capias* (a) and procure the original, and return, and file it for you. Pay him 2s. 6d. for the first count and 6d. for every other count of the *capias*, and the same for the original, which he must pay to the curfitor, and 4d. for filing the original, so that you pay the filazer 5s. 4d. for the first count, and 1s. for every subsequent count. Sealing *capias* 7d. To the sheriff for warrant 2s. 4d.

(a) Though it is the filazer's duty to make out the *capias*, alias, &c. yet for the sake of expedition you may have occasion to make these writs out yourself.

therefore you'll find the form of a *capias*, &c. on this page and page 318.

Fines on original.] Where the damages laid exceed 40l. the following fines must be paid to the king.

	l.	s.	d.
From 40l. to 100 marks	0	6	8
From 100 marks to 100l.	0	10	6
From 100l. to 200 marks	0	13	4
From 138l. 6s. 8d. to 166l. 13s. 4d.	0	16	8
From 166l. 13s. 4d. to 200l.	1	0	0
And for every 100 marks more	0	6	8
And for every 100l. more	0	10	0

The form of a special capias.

GEORGE the second, &c. To the sheriff of *Middlesex*, greeting. We command you, that you take C. D. late of the parish of in your county, mercer, if he may be found in your bailiwick, and safely keep him, so that you may have him before us on the morrow of all souls, wheresoever we shall then be in *England*, to answer to A. B. of a plea, that whereas the said C. on the day, &c. [as in the declaration to]

to

Note; In all writs by original you leave out the word *then* before the teste, and only say, and *have there this writ.* *Witness,* &c. the place of the return being *wheresoever,* &c. and therefore uncertain.

to the damage of the said *A.* of _____ pounds as is said; and have there this writ. *Witness,* &c.

To be signed by the filazer.

Alias capias, &c.] If defendant cannot be taken on the *capias*, plaintiff may sue out an *alias capias*, and after that a *pluries*.

In the *alias capias*, after the words, *we command you*, add, *as we have heretofore commanded you.*

In the *pluries*, after the words, *we command you*, add, *as we have oftentimes commanded you.*

Testatum capias.] If the defendant does not live in the county in which you intend to try your cause, you must sue out a *testatum capias* against him into the county wherein he lives, and get him arrested thereon.

This writ is grounded upon a *capias* issued into the county wherein you intended to try your action.

Of teste and return of original and subsequent process.] The teste of the original [which must be at least 15 days before the teste of the *capias*] must be subsequent to your cause of action.

Motion to quash a special *capias* that was teste 17 June last, the cause of action appearing on the face of it to arise 21 Sept. after. But the court said, quashing was not *ex debito justitiæ*, and therefore they would give the plaintiff an opportunity to set it right if he could, by filing a bill

a bill as of this term. *M. 4 G. 2. Andrews v. Dingley, Str. 877.*

The return of the original is the teste of the *capias*, the return of the *capias* is the teste of the *alias*, and return of the *alias* the teste of the *pluries*, unless the return of any of them happen on the effoin day before any term, and then the next writ must bear teste the first day of that term, for it cannot bear teste out of term.

The original and the subsequent writs grounded thereon must have 15 days between the teste and return of each, except in the cases mentioned in the *stat. 16 Car. 1. c. 6. s. 7. and 13 Car. 2. stat. 2. c. 2. s. 7.* See *antea*, p. 17.

Common appearance.] Enter it with the filazer; pay 2 s. 6 d.

Of putting in special bail.] You carry to the filazer's office a note of the names of the bail with their pleas of abode and additions, and he will attend on a judge at his chambers in order to put in special bail. Pay the filazer 12 s. 6 d. and for duty 2 s. judge's clerk 2 s.

Notice of bail, excepting against and adding and justifying bail.] As to each of these you observe the directions given *antea*, p. only the exception to bail by original must be entred in the filazer's book.

The filazer on adding or justifying bail will attend with his book.

How to proceed in case defendant cannot be arrested on the capias, &c.] Where defendant cannot be arrested on the *capias*, *alias* or *pluries*, the filazer will [on application] make out an
exigent

exigent and *proclamation*. If defendant does not appear on the return of the *exigent* (which he may do by entering a common appearance, be your action for ever so much) then the filazer will make you out a *capias utlegatum* either *general*, which is to take the body only, or *special*, which is as well to extend the defendant's goods and chattels, lands and tenements, as to take his body.

If the defendant be arrested on the *capias utlegatum*, he must give bail to answer the condemnation, and cannot discharge his bail by surrendering himself, but the defendant must either pay the condemnation money himself, or his bail for him.

[See *outlawry* p.]

Declaring.] The method of declaring by original.

Declaration by original.

Hilary term, &c.

Middlesex, C. D. late of Westminster in the county to wit, *C. of Middlesex*, mercer, was attached to answer *A. B.* in a plea of trespass on the case (*a*), and whereupon the said *A. B.* by his attorney, complains, that whereas, &c. [here go on with the declaration] to the damage of the said *A. B.* of pounds, and thereupon he brings suit, &c. (*b*)

(*a*) As the action is.

(*b*) You omit the pledge to prosecute, they being returned upon the original.

NOTE.

NOTE.

Process issues into one county, defendant is arrested, and bail put in. Afterwards plaintiff lays his action in another county, though it is good against the defendant, yet his bail are discharged, if the action be by original, and are not liable to a *scire facias*. See 3 *Lev.* 235, 245. *Aliter*, if the action be by bill,

Of rule to plead.] As to this observe the directions given *p.*

Upon a special *capias* by original the defendant shall not be obliged to plead sooner than upon a common *latitat*. *Hil.* 12 G. 1. *Haywys v. Savage*, *Str.* 684. The reporter says, that the practice was certainly to the contrary, but that the court, out of disinclination to favour proceedings by original, would not allow there was any difference, so that now (says the reporter) there is no advantage in taking out a special *capias*, and therefore he supposes it will be discontinued. *Ibid.*

Where the suit is by original, defendant is not bound to plead to the declaration till *Oyer* and a copy of the declaration is given, if demanded, and defendant shall have such time after to plead as he had when *Oyer* was demanded.

Issue.] In making up the issue you begin with the declaration, and at the end of the issue you award the *venire* thus: "Therefore it is commanded to the sheriff, that he cause to come before our lord the king from the day of [the return of the *venire*; but it is

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usual to leave a blank] wheresoever he shall then
 “ be in *England*, twelve, &c. by whom, &c.
 “ and who neither, &c. to take cognizance, &c.
 “ because as well, &c. The same day is given
 “ to the parties, &c.”

Record of nisi prius.] In making up the record the *jurata* runs thus;

Middlesex. The jury between *A. B.* by his attorney plaintiff, and *C. D.* late of, &c. of a plea of trespass on the case, is respited before our lord the king until from *Easter* day in 15 days wheresoever, &c. [*as by bill*]. The same day is given to the parties aforesaid, &c.

Venire facias.

GEORGE the second, &c. To the sheriff of greeting. We command you, that you cause to come before us on the *octave* of the purification of the blessed virgin *Mary*, wheresoever we shall then be in *England*, twelve free and lawful men of the body of your county, each of whom has ten pounds by the year of lands, tenements or rents, by whom the truth of the matter may be better known, and who are in no wise a-kin either to *A. B.* gentleman, the plaintiff, or to *C. D.* late of, &c. to make a certain jury between the parties aforesaid in a plea of trespass on the case (*a*), because as well the said *C. D.* as the said *A. B.* between whom the contention is, have put themselves upon that jury; and have there the names of the jurors, and this writ. Witness, &c.

(a) If in ejectment, say, of a plea of trespass and ejectment,

Distringas.

Distringas.

GEORGE, &c. To the sheriff of greeting. We command you, that you distrain the several persons named in the panel annexed to this writ, being the jurors summoned in our court before us, between *A. B.* gentleman, plaintiff, and *C. D.* late of, &c. by all their lands and chattels in your bailiwick, so that neither they, nor any one by them, lay their hands upon them, until you shall have another precept thereupon from us, and that you answer to us of the issues thereof, so that you may have their bodies before us, on _____ wheresoever we shall then be in *England*, or before [*as in a distringas by bill*] to make a certain jury between the parties aforesaid, in a plea of trespass on the case, and to hear their judgment thereupon of many defaults; and have there the names of the jurors, and this writ. Witness, &c.

Both the above writs are to be signed by the filazer, and sealed.

Subpœna ad test'.

GET a blank from your stationer; fill it up, then get it signed by the filazer, pay him 1s. 8d. sealer 7d. You may put four names in one *subpœna*, make out *subpœna* tickets (a), (a) See *antea* and serve each witness with one. p. 159.

Subpœna ad testificandum.

GEORGE, &c. To *T. I.* &c. [naming the witnesses] greeting. We command you, that
Y 2 not-

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notwithstanding all and singular your busineses and excuses whatsoever, you be in your proper persons before us, [as in *subpœna ad test*, where the proceedings are by bill, see *p.*] to testify all and singular those things which you know in a certain action now depending undetermined in our court before us, between *A. B.* plaintiff, and *C. D.* late of, &c. in a plea of trespass on the case; and this you are in no wise to omit, under the penalty of one hundred pounds. Witness, &c.

For a *subpœna* ticket see *p.* 159.

Writ of inquiry of damages.] In case you get judgment by default, and it is not *final*, then you make out a writ of inquiry, which must be signed by the filazer, and sealed.

Writ of inquiry of damages.

GEORGE the second, &c. To the sheriff of greeting. Whereas *C. D.* late of in your county, mercer, was attached to appear (or *be*) in our court before us to answer *A. B.* of a plea, wherefore whereas [here insert the declaration as in an inquiry by bill, to] to the damage of the said *A. B.* of pounds as it is said, and such proceedings were had in our said court, that the said *A. B.* ought to recover against the said *C. D.* his damages by occasion of the said trespass upon the case; but because it is unknown to our court before us what damages the said *A. B.* hath sustained by occasion of the premisses, we therefore command you, that by the oath of twelve good and lawful men of your bailiwick you diligently enquire what damages the said *A.* hath sustained, as well by occasion of

of the premisses; as for his costs and charges by him about his suit in that behalf expended, and that the inquisition which you shall thereupon take, you send to us from the day, &c. [the return] wheresoever we shall then be in *England*, under your seal and the seals of them by whose oath you shall take that inquisition, together with this writ. Witness, &c.

Of signing nonpros, when proceedings are by original. The defendant must before the end of the second term, or within four days after, enter a rule for the plaintiff to declare, and he must likewise demand a declaration in writing, and if the plaintiff don't declare before the expiration of the rule, then the defendant may, at any time before the effoin day of the subsequent term, sign a nonpros, but cannot afterwards.

Proceedings to an outlawry.

Præcipe for original.

London. IF *A. B.* gives you security to prosecute to wit, I his suit, then put by sureties and safe pledges *C. D.* late of in the said county, that, &c. to shew wherefore, that whereas the said *C. D.* &c. [here set forth the cause of action, as by a declaration]. But instead of saying, "To the damage of the said *A.* pounds, and therefore he brings this suit, &c." say, "To the damage of the said *A.* pounds, as he says."

R. S.

— Jan. 17 :

Ret. &c. [a general return] wheresoever, &c.

Y 3

As

The present Practice of the

As the only difference in proceeding to outlawry in *this* court and the *Common pleas* is by making the original returnable in the court designed, I refer the reader for further directions concerning this head to the present practice of the *Common pleas*, tit. *Outlawry*, p. 395. But as the exigent, proclamation, &c. are *there* omitted, I have inserted them *here*.

Exigent.

GEORGE, &c. To the sheriff of *Middlesex*, greeting. We command you, that you cause *C. D.* late of the parish of, &c. in your county, mercer, to be demanded from county court to county court, until according to the law and custom of our kingdom of *England* he be outlawed, if he does not appear; and if he does appear, then take him and keep him safely, so that you may have his body before us on, &c. [the return] wheresoever we shall then be in *England*, to answer to *A. B.* of a plea, wherefore whereas the said *C.* on, &c. [here insert the whole declaration] to the damage of the said *A.* of pounds, as it is said, and whereupon you did in three weeks from, &c. last past, make a return to us, that the said *C. D.* was not found in your bailiwick; and have you there this writ. Witness, &c.

*Wallis.**Proclamation.*

GEORGE the second, &c. To the sheriff of *Middlesex*, greeting. Whereas by our writ we have lately commanded you, that you
cause

cause *C. D.* late of the parish of, &c. in your county, mercer, to be demanded from county court to county court, until according to the law and custom of our kingdom of *England* he be outlawed, if he shall not appear; and if he should appear, then that you should take him and keep him safe, so that you might have him before us on, &c. [the return] wheresoever we should then be in *England*, to answer to *A. B.* of a certain plea of trespass on the case, to the damage of the said *A.* of pounds, as is said: We therefore command you, that pursuant to the statute made for such purpose in the thirty-first year of the reign of *Elizabeth*, late queen of *England*, you cause the said *C. D.* to be proclaimed three several days, according to the form of the said statute, one of which proclamations to be made at or near the most usual church door of the parish where the said *C. D.* is an inhabitant, that he render himself to you, so that you may have his body before us at the aforesaid time, to answer the said *A. B.* of the plea aforesaid; and have there this writ. Witness, &c.

Wallis.

Return of the exigent.

AT my county court held for the county of *Middlesex*, at the sign of in the parish of *St. Andrew* in *Holburn* in the county aforesaid, on the day of in the year within written, the within named *C.* was a first time demanded, and did not appear, and at my county court held for the said county of *Middlesex*, at the sign of aforesaid, the day of in the year aforesaid, the

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saïd C. was a second time demanded, and did not appear; and at my county court held for the saïd county of *Middlesex* at the sign of aforesaid, the day of in the year aforesaid, the saïd C. was a third time demanded, and did not appear.

The answer of

and

esq;

esq;

} sheriff.

This writ as above indorsed was delivered to me the under-named present sheriff, by the above-named late sheriff at his going out of his office.

At my county court held for the saïd county of *Middlesex*, at the sign of aforesaid, the of in the year aforesaid, the saïd C. was a fourth time demanded, and did not appear; and at my county court held for the saïd county of *Middlesex*, and at the sign of aforesaid, the day of in the year aforesaid, the saïd C. was a fifth time demanded, and did not appear.

Therefore by the judgment of esq; and esq; coroners of our sovereign lord the king for the county aforesaid, the saïd C. is outlawed.

The answer of

and

esq;

esq;

} sheriff.

Return

Return of proclamation.

BY virtue of the within writ to me directed,
I caused the within named C. to be pro-
claimed three several days, according to the
effect of the within mentioned statute, as it is
within commanded me.

The answer of

and

esq;

esq;

} sheriff.

Special capias utlagatum.

GEORGE the second, &c. To the sheriff
of Middlesex, greeting. We command you,
that you fail not on account of any liberty within
your county, but that by the oath of good and
lawful men of your county you diligently in-
quire what goods and chattels, lands and tene-
ments C. D. late of the parish of, &c. in your
county, mercer, hath or had in your bailiwick
the day of last past, or at any time
afterwards, on which day he was outlawed in
your county at the suit of A. B. in a certain plea
of trespass on the case, to the damage of the said
A. of pounds, as you have returned to
us some time since, and by their oath cause the
same to be extended and appraised, according
to the true value thereof: And whatever you
find by that inquiry, take into our hands and keep
safe, so that you answer to us the value and issue
thereof: And having so extended and appraised
the same, what you shall have done therein
make

In case the
defendant's
goods are
taken on a
special capias
utlagatum, I
think it will
not be worth
the plaintiff's
while to pro-
ceed against
them by in-
quisition, &c.
unless they are
of the value of
50 or 60 l.

make known unto us on the, &c. [the return] wheresoever we shall then be in *England*, distinctly and plainly under your seal, and the seals of those by whose oath you shall have made the extent and appraisement: And for that the said *C. D.* conceals himself, and runs up and down from place to place in your county, in contempt of us, and in prejudice of our crown, as we are informed: We command you also, that you take the said *C. D.* wheresoever he shall be found in your bailiwick, as well within a liberty as without, and keep him safe, so that you may have him before us at the aforesaid time to do and to receive what our court before us shall in this case determine; and have there this writ. Witness, &c.

Wallis.

Return of special cap. utlagatum.

BY virtue of this writ to me directed, I have taken the body of the within named *C. D.* whose body I kept in my safe custody until afterwards, to wit, on the day of in the year of his majesty's reign, on which day I received his majesty's writ of *habeas corpus cum causa* to me directed, by virtue of which writ immediately after the receipt thereof, to wit, on the said day of I did conduct the body of the said *C. D.* before one of the justices of the king's court of the bench, according to the command of the said writ, which said justice did then receive from me the body of the said *C. D.* and did commit him to the custody of the warden of his majesty's prison of the *Fleet*, and did then discharge

discharge me from the further keeping of the said *C. D.* And therefore I cannot have the body of the said *C. D.* before our lord the king on the day within mentioned, wheresoever our said lord the king shall then be in *England*, as by the said writ I am commanded. The further execution of this writ appears in the inquisition and inventory hereunto annexed.

The answer of

and

esq;

esq;

} sheriff.

The inquisition.

Middlesex, **A**N inquisition indented, taken at the *three Tuns* in *Brookstreet* near *Holbourn* in the county aforesaid, the day of in the thirty-first year of the reign of our sovereign lord *George* the second, by the grace of God of *Great Britain, France* and *Ireland* king, defender of the faith, before me esq; and esq; sheriff of the county aforesaid, by virtue of the king's writ to me directed, and to the inquisition annexed, on the oath of *E. F. &c.* (naming the jury) good and lawful men of my bailiwick, who being sworn and charged to inquire of all such matters and things as in the said writ are mentioned and contained on their oath do say, that *C. D.* in the said writ named, on the day of last, on which day he became outlawed, was and on the day of taking this inquisition is possessed, as of his own goods and chattels, of and in the several goods and chattels particularly mentioned

mentioned and expressed in the schedule or inventory thereof hereunto annexed, which said goods and chattels are worth to be sold the sum of

All which said goods and chattels I the sheriff by virtue of the said writ on the day of taking this inquisition have seized and taken into his majesty's hands, according to the command of the said writ: And the jurors aforesaid on their said oath further say, that the said C. D. on the day of or at any time since, had not any lands or tenements, or on the day of taking this inquisition had any other or more goods or chattels in my bailiwick, which can be seized or taken into his majesty's hands, according to the command of the said writ. In witness whereof as well I the said sheriff, as the said jurors, have to this inquisition set our seals the day, year and place first above mentioned.

Venditioni exponas.

GEORGE the second, &c. To the sheriff of *Middlesex*, greeting. Whereas by a certain inquisition indented, taken at the *three tuns* in *Brookstreet* near *Holbourn* in the said county, the day of last before you esq; and esq; sheriff of our said county, by virtue of our writ of *capias utlagatum*, under the seal of our court of king's bench to you the said sheriff directed, whereby we commanded you to inquire what goods and chattels, lands and tenements C. D. late of the parish of, &c. in the county of *Middlesex*, mercer, had within your bailiwick on the day of last past, or at any time afterwards, on

on which day he was outlawed in the said county at the suit of *A. B.* in a plea of trespass on the case, it was found by the oath of *E. F.* and other good and lawful men of the said county, that *C. D.* in the said writ named, on the day of

last, on which day he became outlawed, and on the day of taking the said inquisition, was possessed, as of his own proper goods and chattels, of and in the several goods and chattels, particularly mentioned and expressed in the schedule or inventory thereof hereunto annexed, which said goods and chattels were worth to be sold the sum of

pounds, all which goods and chattels you the said sheriff, by virtue of our said writ, on the day of taking the said inquisition did seize and take into our hands, as by the said writ and inquisition taken thereupon, transcribed into our court of exchequer, and there remaining in the custody of our remembrancer, more fully appears. And being desirous to be satisfied of the value of the said goods and chattels in the said inquisition mentioned, as is just, command you, that you sell or cause to be sold the said goods and chattels, and every part thereof, for the best price that can be got for the same, and at the least for the said sum of

at which they were appraised as aforesaid, so that you have the sum of money arising by such sale before the barons of our exchequer at *Westminster* the day of this instant

then and there to be paid in for our use, and that you make then and there distinctly and clearly appear to our said barons all that you shall do concerning the premisses; and have you then and there this writ. Witness *Sr. Thomas Parker*,
knt. at *Westminster*, the day of

in

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in the year of our reign, by the said
transcript, and by the barons.

Masbam.

The return.

BY virtue of this writ to me directed, I have caused the goods and chattels in the schedule or inventory hereunto annexed, mentioned to be sold for the sum of
being the best price I could get for the same, which monies I have before the barons of the king's exchequer at *Westminster* on the day within mentioned, ready to pay to his majesty's use, according to the command thereof.

The answer of

and

esq; }
esq; } sheriff.

The form of a petition to the lords commissioners of the treasury, in order to have the money paid to the plaintiff.

To the right honourable the lords commissioners of his majesty's treasury, the humble petition of R. R.

Sheweth,

THAT *W. S.* late of, &c. being indebted to your petitioner in the sum of
Your petitioner did in the month of
last at his very great charge prosecute the said
W. S.

W. S. to an outlawry, and by virtue of a special *capias utlagatum* directed to the sheriff of *Middlesex*, several goods of the said *W. S.* were seized and found by inquisition to be of the value of which goods were afterwards sold by the said sheriff, by virtue of a writ of *venditioni exponas*, at the same price and value they were so appraised at, and the money thereupon raised now remains in the hands of the sheriff of *Middlesex*.

That your petitioner's said debt and the charge he has already been at in prosecuting the said outlawry, greatly exceeds the sum so remaining in the sheriff's hands.

Wherefore your petitioner humbly prays your lordships, that the money so levied as aforesaid may be paid over to your petitioner.

And your petitioner shall ever pray, &c.

This petition the lords of the treasury will refer to the solicitor, and the plaintiff must make an affidavit of his debt, &c.

The form of the affidavit, which must be sworn before a baron of the court of exchequer.

A. B. of, &c. esq; maketh oath, that *C. D.* late of, &c. mercer, is justly indebted to this deponent in the sum of pounds for (here set forth upon what account the defendant became indebted to the plaintiff) for which debt this deponent did cause several writs successively to be issued out of his majesty's court of king's bench

bench at *Westminster* against the said *C. D.* and did use his utmost endeavours to get the said *C. D.* arrested on each of the said writs; but this deponent saith, that he this deponent not being able to procure any of the said writs to be executed, did cause the said *C. D.* to be sued to an outlawry, and thereupon several of his goods, to the amount of pounds to be seized into his majesty's hands, and sold by virtue of a writ of *venditioni exponas*, as this deponent is informed, and verily believed to be true; And this deponent saith, that his attorney's bill for fees and disbursements in outlawing the said *C. D.* and causing his goods to be seized and sold by virtue of a writ of *venditioni exponas*, doth amount unto the sum of pounds, as appears to this deponent by such bill delivered to him by his attorney, and which bill this deponent, as far as he is capable of judging, believes to be just and reasonable: And this deponent further saith, that he hath paid the several following sums on account of such outlawry, and which said several following sums are not included in his said attorney's bill, that is to say, to the sheriff's officer for executing the writ of *capias utlagatum* 2*l.* 2*s.* to two appraisers for appraising the said goods so seized as aforesaid the sum of 2*l.* 2*s.* [here set forth the several sums paid, to whom, and for what] which said several sums of, &c. [here mention the money due on the attorney's bill and the several sums paid] do together with this deponent's said debt of pounds amount unto the sum of besides the fees to be paid in the treasury, and other offices in obtaining his majesty's warrant, which this deponent

ponent is informed, and verily believes will amount to pounds

Sworn, &c.

The next step to be taken is to obtain the solicitor's report, and after that the king's warrant countersigned by the lords of the treasury. The form of the warrant is as follows:

George R.

WHereas we are given to understand, that there is remaining in the hands of esq; and esq; the present sheriff of the county of *Middlesex*, the sum of for so much levied by him on the several goods belonging to *C. D.* which were seized into our hands by virtue of an inquisition taken by virtue of a writ of *capias utlagatum* issued out of our court of king's bench against the said *C. D.* at the suit of *A. B.* for the recovery of a debt due and owing to him from the said *C. D.* And whereas it further appears by reports, certificates and other proper testimonials, which the commissioners of our treasury have laid before us, that the debt due and owing to the said *A. B.* from the said *C. D.* together with the costs which he hath been at in carrying on the said prosecution against the said *C. D.* for recovery of the said debt, doth exceed the said sum of remaining in the hands of the said sheriff as aforesaid: To the end therefore that the said *A. B.* may have and receive some recompence and satisfaction towards his said debt and charges he hath been at in suing for the same, our will and pleasure is, and we do hereby authorize and direct you to consent and agree, that so much

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of the said _____ as doth or shall remain in the hands of the said sheriff (after deducting the usual poundage for levying the same) be paid over to the said C. towards satisfaction of his said debt and costs accordingly, whenever he by his counsel learned in the law shall think fit to move our court of exchequer for an order for that purpose; and we do also authorize and direct you to do, or cause to be done, such further or other acts as our said court of exchequer upon such motion shall or may judge necessary for rendering our intentions herein most firm, valid and effectual; and for so doing this shall be your warrant. Given at our court at *St. James's* the _____ day of _____ in the _____ year of our reign.

By his majesty's command.

To our trusty and
well beloved *Charles*
Prat, esq; our at-
torney general.

Newcastle.
Hen. Bilson Legg.
Robert Neugent.
Besborough.

Subpœna.

GEORGE the second, &c. To
_____ esq; and _____ esq; sheriff of our county
of *Middlesex*, or to their under-sheriff, greeting.
We command you, that laying aside all ex-
cuses, you obey, fulfil and perform all and every
matter and thing specified in an order of our
court of exchequer at *Westminster*, made in a
cause in our said court depending between us
and *C. D.* outlawed at the suit of *A. B.* upon an
outlawry, the tenor of which order for your
fuller

fuller information therein is hereunto annexed. And this you are not to omit, under the penalty of one hundred pounds, which we shall cause to be levied upon your goods and chattels, lands and tenements, for our use, if you neglect this our command. Witness Sr. Thomas Parker, knt. at *Westminster*, the day of in the year of our reign. By the said order made the same day, and by the said barons. *Masbam.*

An order to the sheriff to pay the money to the prosecutor.

IT is found in a certain book of orders of this exchequer, to wit, among the orders of term in the year of the reign of king *George* the second, in the page on the part of this remembrancer as follows:

the 19th day of 175

BETWEEN the king and *C. D.* outlawed at the suit of *A. B.* upon an outlawry, upon the motion of Mr. of counsel of *E. B.* widow and administratrix of *A. B.* deceased, informing the court, that the said *C. D.* having been prosecuted to an outlawry by the said *A. B.* upon an action of trespass upon the case in his majesty's court of king's bench, a writ of outlawry thereupon issued against the said defendant, under the seal of the said court, directed to the sheriff of *Middlesex*, by virtue whereof the said sheriff seized by inquisition several goods and chattels belonging to the said defendant, appraised at and further informing the court,

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that the said writ of outlawry and inquisition being transcribed into this court, a writ of *venditioni exponas* under the seal of this court issued on the day of last, for selling the said goods, returnable the day of the said month of at which time esq; and esq; the present sheriff of *Middlesex*, returned the said writ, and certified, that they had sold the said goods and chattels for the said sum of It was therefore prayed by the said Mr. that the said esq; and esq; or their undersheriff, might forthwith pay to the said *E. B.* administratrix of the said prosecutor, or her order, the said sum of towards satisfaction of the debt due from the said defendant to the said prosecutor: Whereupon and on hearing *Charles Prat*, esq; his majesty's attorney general, consenting thereto, on behalf of his majesty, it is ordered by the court as prayed, the said sheriff first deducting out of the said the usual poundage.

The form of a superseedeas to the exigent.

GEORGE the second, &c. To the sheriff of *Middlesex*, greeting. Whereas by our writ we have lately commanded you, that you should cause *C. D.* late of in the county of esq; to be demanded from county court to county court, until, according to the law and custom of our kingdom of *England*, he be outlawed, if he did not appear; and if he appeared, that you should take him and keep him safe, so that you might have him before us in, &c. [*the return*] wheresoever we should then be

be in *England*, to answer to *A. B.* of a certain plea of trespass on the case, to the damage of the said *A. B.* of pounds, as is said:

Now forasmuch as the said *C.* before the issuing our said writ of *exigent*, appeared in our said court before us by his attorney, and often offered to answer the said *A.* of the plea aforesaid, our said writ did not duly issue: We therefore command you, that you forbear all further demanding the said *C.* or outlawing, taking, or any way molesting him on that occasion; and have there this writ. Witness *Wm.* Lord Mansfield, at *Westminster*, &c.

Note; Tho' the writ says, that the defendant appeared before the issuing of the *exigent*, yet if an appearance be entered.

Wallis.

You put the attorney's name to this writ, but need not the day, &c. when sued out.

N O T E S.

1. Attornies to deliver writs of proclamation, and sheriffs duly to execute them. *Rule, M. 1654. sect. 6.*

2. A prisoner taken upon a *capias* in process not to be discharged till he hath given bond to appear. *Ibid.*

3. A man is outlawed in *Middlesex*, a *capias* *ullagatum* may be sued out against him in any other county without a *testatum*. *2 Vent. 33.*

4. Where the process is against two on a joint cause of action, and one only is arrested and puts in bail, the other must be outlawed before there can be any further proceedings. *M. 8 G. 1. Edwards v. Carter & al', Str. 473.*

5. Defendant pleads an outlawry in disability of the plaintiff, and it being reversed, he cannot plead another in disability.

(a) 13 Ed. 1. 6. By *stat. Westm. 2.* (a) proclamation of outlawry is to be made in the county court, every freeholder being supposed to be there, because there he ought to be, and therefore bound to take notice of it. *Carth. 484.*

Note this.

7. Plea of *ten* outlawries on *mesne* process in disability. Demurrer. *Judic' quod respondeat ulterrius.* Plea ill for duplicity, for the plaintiff was as well disabled by one outlawry as by all the other *nine*, to which several answers are required. *T. 3 Jac. 2. Trevilian v. Seccomb, Carth. 8.*

8. *Erbo*, who was a foreign merchant, and never in *England*, was outlawed at the suit of *Matthews* in an action on several promises for goods sold and delivered, and upon a special *capias utlagatum* a ship and other effects belonging to *Erbo* were seized as forfeited upon this outlawry. Motion that this outlawry might be vacated, and restitution awarded, upon affidavits that the defendant was never *infra legem*, *i. e.* that he was never in *England*, and therefore could not be outlawed, because that was putting him *extra legem.* *Sed per Cur' :* This outlawry shall not be vacated upon such affidavits, but the defendant may bring a writ of error, which he accordingly did, and put in bail according to the *new* statute, whereupon the plaintiff consented to the reversal of the outlawry.

Note; This was a good project (says the reporter) to get bail from a foreigner. *M. 10 W. 3. Matthews v. Erbo in B. R. Carth. 4.*

*Proceedings by habeas corpus ad faciendum
& recipiendum.*

WHERE a defendant is arrested by the sheriff on *mesne* process, or on an *execution* (a), he may, in order to avoid going to the county gaol, or, if confined there, to get out, remove himself by *habeas corpus* to the king's bench prison, and enjoy the rules on giving proper security to the marshal.

Note; Where the defendant is not charged in custody of the sheriff with process out of this court, he must, in order to be removed, get some creditor of his, to sue out of this court a bailable writ against him, and deliver it to the sheriff before he brings his *habeas corpus*, otherwise he cannot be turned over.

Where an habeas corpus may be made returnable immediately.] An *habeas corpus* to remove the body of a prisoner, directed to the sheriffs of London, or sheriff of Middlesex, the judge of the *marshalsea* court, or other inferior court within five miles of London, may be granted in vacation or term-time, returnable immediately. *Rule, M. 1654. sect. 7, 8.*

(a) *Stat. 2 H. 5. stat. 1. c. 2.* says, That if upon a *certiorari* or *corpus cum causa* it be returned, that the prisoner is condemned by judgment given against him, he shall presently be remanded and remain in prison without being let to bail against the will of the plaintiffs, until agreement (satisfaction) be made to them of the sums adjudged. See *postea* p. note.

When an habeas corpus cannot be returnable immediately.] Writs of habeas corpus to remove causes out of inferior courts (except courts within five miles of London, as the sheriffs court in London, marshalsea court, &c.) must be returnable on a day certain in court in the term, and not immediately, unless it be to deliver over a prisoner in discharge of his bail. Rule, 1654. sect. 7.

And every such writ, that shall be sued out in Hilary or Trinity term, or the beginning of the following vacation, must be returnable on the first or second return of the subsequent term.

And if returnable in Hilary or Trinity term, the writ ought to be made returnable the first or second return of those terms; and if returnable later, any judge of the court may grant a *procedendo*.

Of suing out a habeas corpus, and putting it allowed (a).] Write the *habeas corpus* upon a *(a)* A writ of *habeas corpus* 5 s. stamped piece of parchment. Then write a *cum causa, fiat* on unstamped paper.
sued out of

any of the courts at Westminster to an inferior court, shall be allowed, unless delivered to the judge or officer, before any of the jury are sworn. Stat. 43 Eliz. c. 5. sect. 2. And such writ shall not be allowed to stay or remove any cause depending in any court of record, which shall have jurisdiction to hold plea of the cause, unless delivered before issue or demurrer joined, so as it be joined within six weeks after the arrest or appearance. Stat. 21 Jac. 1. c. 23. s. 2.

The Fiat.

Middlesex. **L**ET there be a *habeas corpus* for C. D. to do and receive, returnable immediately.

Make

Make a note for the office thus:

Middlesex. Habeas corpus for C. D. to do and receive.

Returnable immediately.

R. S. of — 1760.

Carry the *fiat* and note for the office to Mr. Heberdine in the king's bench office, who will sign the writ, and keep the *fiat* for the judge to sign (a). Pay 6s. 8d. in term-time, and in vacation 7s. 8d. Sealing 7d. Lodge the writ in the office for allowance.

(a) Habeas for removing of a prisoner to be signed

by the chief justice, or one of the justices of the court, out of which the writ issues, under the penalty of 5*l.* Stat. 1 & 2 P. & M. c. 13.

In *Middlesex* the fees are, if defendant be charged with one action, 9s. 4d. If with more actions than one, the sheriff takes 2s. 4d. for each action; and if defendant be in *Newgate*, you pay 2s. 4d. more for a warrant to the keeper to deliver him to the bailiff.

If your *habeas corpus* is to the palace court, you pay for having it allowed 5s. viz. 4s. 8d. and 4d. for the *jurat*.

For the form of a *habeas corpus*, see *p.*

Commitment, &c.] The *habeas corpus* being returned by the sheriff, the bailiff will bring the defendant to a judge's chambers, who will commit him to the king's bench prison. Pay to the bailiff 10s. At the judge's chambers 8s. 6d. and 6s. 8d. to the tipstaff, who will carry the defendant to the king's bench prison.

If the *habeas* be returnable in court, you pay to the judge's clerk 4s. secondary 2s. deputy marshal

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marshal 2s. chaplain 2s. clerk of the papers
1s. cryer 6d. tipstaff 10s.

Note; Persons committed to the custody of the marshal on a *habeas corpus*, must remain in actual custody two days next after such commitment, notwithstanding a *habeas corpus* from any other court. *Rule, Hil. 5 W. & M.*

Where any person shall be brought into court upon a *habeas corpus*, or before a judge, in order to be committed to the custody of the marshal of this court, the writ of *habeas corpus* together with the return thereof, shall be left with the secondary or judge's clerk, before whom such person was brought, to be filed, and a copy or note of such return of the writ of *habeas corpus* under the hand of the judge or secondary, shall be delivered to the marshal at the time of the commitment of such person to his custody, and such copy or note shall be made and prepared by the person prosecuting such writ of *habeas corpus*, or by his attorney. *Rule, T. 3 Annæ.*

Of removing causes, where the action does not exceed five pounds.] By statute 21 Jac. 1. c. 23. it is enacted, That if in any cause not concerning freehold or inheritance, or title of land, lease or rent, which shall be brought in any court of record within any city, liberty, town corporate, or elsewhere, which shall have jurisdiction to hold plea in that cause, if it shall appear or be laid in the declaration, that the debt, damages, or things demanded doth or shall not amount to or exceed the sum of five pounds, that

By stat. 12
G. 1. c. 29.

s. 3. the judges

of such inferior courts, as are described by stat. 21 Jac. 1. c. 23. may proceed in such actions, as are therein specified, which appear or are laid not
to

that then such cause shall not be stayed nor removed into any of his majesty's courts at *Westminster*, &c. by any writ or writs whatsoever, to be sued or prosecuted forth or out of his majesty's courts at *Westminster*, &c. other than writs of error or attain. See *sect. 4.*

to exceed 5*l.*
although there
be other
actions against
the defendant,
wherein the
plaintiff's de-
mands shall
exceed 5*l.*

And if any writs shall be sued forth contrary to the intent and meaning of this act, that then it shall and may be lawful to and for the judge or officer, to whom such writs shall be directed or delivered, to disallow or refuse the same, and to proceed as if no such writs had been granted or sued out. *Sect. 5.*

Provided always, that this shall extend only to such courts of record in liberties, &c. for so long time only as there is or shall be an utter barrister of three years standing at the bar of one of the four inns of court, that is or shall be steward, under steward or deputy steward, town clerk or judge, or recorder of the same inferior court, or that is, or shall be from time to time assistant to such judge, as shall not be an utter barrister of such standing as is aforesaid, and there present, and not of counsel in any action, suit or cause then depending in the same inferior court. *Sect. 6.*

Provided, that this act, or any thing therein contained, shall not extend to any cause, wherein any such foreign or other plea shall be pleaded as could not be tried or determined within the jurisdiction of such inferior court. *Sect. 7.*

The defendant is arrested by process out of *Exeter* court in a plea of trespass upon the case, and bail is given, and the plaintiff declared, then the cause is

Of bail on a habeas corpus.] Special bail is required in *all* causes removed by *habeas corpus* (*a*) out of inferior courts, except the defendant be an executor (*b*) or administrator, or the action be for words or small assaults, unless a judge of the court shall otherwise order. See *Rules, M. 1654, f. 9. H. 2 f. 2.* Upon a removal from an *inferior* court an heir shall not be held to a special bail, as he was below. *M. 29 Car. 2. Sr. John Lawrence v. Blithe in B. R. 2 Lev. 204.*

removed by *habeas corpus*, and the plaintiff delivers two declarations, one for words, and another for money, upon promise. *Hale C. J.* said, that if the party have declared before the *habeas corpus* delivered, the bail shall be *special* only as to that action, and shall be *common* bail to the other action; but if no declaration, then the bail put in upon the *habeas corpus* shall be *special* bail to all actions of the plaintiff against the defendant of that term. *Hil. 25 & 26 Car. 2. Serle & Newton, M. S. notes.* (*a*) And though defendant be bailed before the receipt of the writ, yet the officer ought to return the cause. (*b*) An executor finds bail in an inferior court, the cause being removed by *habeas corpus*, shall not find bail above. *T. 21 Car. 2. in B. R. 1 Lev. 268. See 2 Lev. 204.*

No bail on any *habeas corpus* is to be put in until the *habeas corpus* and causes for which bail is to be put in be returned. *Rules, M. 1651. E. 29 Car. 2. Hil. 10 W. 3.*

By the *habeas corpus* the proceedings in the inferior court are ended, and the bail discharged; and the proceedings in the superior court are *de novo*, and bail must be put in *de novo*; the reason is, because the person of the party being removed hither, the inferior court hath lost the jurisdiction over him, and not having jurisdiction over the person, they cannot proceed in the cause, and no more is removed than the person and the cause; the plea, &c. are not removed. *Skin. 244.*

If

If *A.* be brought into *B. R.* by *habeas corpus*, and puts in bail, the bail are liable to all actions mentioned in the return of the *habeas corpus*, wherein the plaintiff or plaintiffs shall declare against the defendant within two terms next after.

Within what time bail must be put in after allowance of habeas corpus.] At the return (a) (a) No bail of the writ of *habeas corpus* plaintiff in term- shall be put in time may have a rule from a judge for a *pro-* upon any writ *cedendo*, unless good bail be put in within four of *habeas cor-* days next after defendant's attorney shall be pus before the writ be re- served with a copy of the rule. turned, and such bail shall

not be taken by any justice of this court, unless that writ with the return thereof shall be offered before the said justice to be filed at the time of putting in thereof. *Hil. 10 W. 3. See E. 29 Car. 2. 8 W. 3. Rule, M. 1651.*

If in *vacation*, then you may leave a rule for a *procedendo*, unless good bail be put in within six days next after notice thereof.

Excepting against bail.] When special bail is put in before any judge of this court *de bene esse* upon an *habeas corpus*, if the plaintiff does not except against the bail within 28 days next after the putting in thereof (b) the bail shall be filed (b) After notice, vide *Rule 1654. f. 8.* by the defendant's attorney within four days next after the end of the said 28 days. *Rule, M. 16 Car. 2.*

Of putting in better bail after exception.] If the plaintiff does except against the bail put in *de bene esse*, he may have a rule from a judge for a *procedendo*, unless defendant put in better bail within four days after service of such rule; and

and this, whether it be in term-time or vacation.

Of notice of putting in bail or excepting to bail.] You must give the like notice in writing, on putting in or excepting to bail on a *habeas corpus*, as you do on a *cepi corpus*. [Vide p.]

Where the plaintiff is and is not bound to accept the bail below.] On removal of a cause by *habeas corpus* out of the *marshalsea*, or other inferior court, the plaintiff is bound to accept the bail below, if they offer themselves in this court; otherwise where a cause comes hither out of London. *Per Holt C. J. M. 11 W. 3. Anon. in B. R. 1 Salk. 97.*

Defendant not to be discharged, till bail be perfected.] Where a defendant is returned in custody on an *habeas corpus*, or *cepi corpus*, he is not to be discharged before bail is perfected.

Bail how taken before commissioners.] If bail be given upon any action removed out of any inferior court by writ of *habeas corpus*, and returned in *B. R.* instead of the plaintiff's name, you write *at the suit of the plaintiff* (or plaintiffs) in the plaint, and the cognizors must undertake, that if the defendant be condemned at the suit of the plaintiff or plaintiffs in the plaint, that he shall satisfy the costs and condemnation, or render his body, &c. *Rule, 8 W. 3. 1696.*

Declaring on an habeas corpus.] You must declare against defendant *de novo*, as in custody of the marshal, for the record itself is never removed

moved by a *habeas corpus*, as it is on a *certiorari*, but remains below. *Salk.* 352. *Skin.* 244.

If a cause be removed by *habeas corpus*, the plaintiff cannot declare before the *habeas corpus* is allowed. *M. S. notes.*

Within what time plaintiff must declare.] The plaintiff must declare before the end of the second term after the return of the writ of *habeas corpus*, and the defendant is not bound to plead to a declaration delivered afterwards.

But if the defendant removes the cause by Nonpros on *habeas corpus*, and puts in bail, he cannot non-pros the plaintiff for want of a declaration in time.

Of laying the venue in causes removed.] If a cause be removed by *habeas corpus* out of the courts of *Canterbury*, *Southampton*, *Hull*, *Litchfield* or *Pool*, which are counties where the judges of assize seldom go, and the action be transitory, it must be laid in the county wherein such city or town is, as *Kent*, *Southampton*, *York*, *Stafford* or *Dorset*. *Rule, Mich. 1654. f. 9.*

What time defendant has to plead in Hilary or Trinity term, and the plaintiff declares in London or Middlesex.] If a cause be removed out of *London* or *Middlesex*, the *marshalsea*, or any other inferior court within five miles of *London*, in *Hilary* or *Trinity* term, and bail is put in, and the plaintiff declares in *London* or *Middlesex*, and delivers his declaration six days before the end of term, the defendant shall plead 3 days before the effoin of the *subsequent* term, that the plaintiff may enter the issue, if he will; but

but if the plaintiff does not deliver his declaration six days before the end of the term, the defendant shall have an imparlance till the next term.

What time defendant has to plead in Hilary or Trinity term, if the action be laid in any other county than London or Middlesex.] If a cause is removed out of any court, except in London or Middlesex, the *marshalsea*, or any other court within five miles of London, and the plaintiff does not declare in London or Middlesex, but in some other county, and the plaintiff delivers his declaration at any time before the end of Hilary or Trinity term, the defendant is bound to plead by the time the rule is out, that the plaintiff may try his cause at the assizes, if he thinks proper; and if the defendant does not plead by that time, judgment may be entered against him.

What time defendant has to plead in Michaelmas or Easter term.] Where the *habeas corpus* is returnable in Michaelmas term, if the declaration be delivered before the *octave of St. Martin*; in Easter term, if delivered before *menssem Pasche*, and the action is laid in London or Middlesex; the defendant must plead to trial the same term; but if delivered after these respective times, and yet six days before the end of either of these terms, the defendant, wherever the action is laid, shall plead to enter three days before the *essoins* day of the subsequent term; and if not delivered six days before the end of either of these terms, the defendant has an imparlance until the next term.

This

This is the old method of proceeding in relation to the defendant's pleading; but since the general rule for pleading on a *cepi corpus*, made T. 5 & 6 Geo. 2. the practice is not yet settled, some attornies following the *old* method of proceeding above mentioned, while others keeping to the said general rule of *Trinity* 5 & 6 Geo. 2. proceed as on a *cepi corpus*.

Note; A plea in abatement on a *babeas corpus* must be pleaded before the rule for pleading is out.

N O T E S.

1. After an interlocutory judgment, and before final judgment, a *babeas corpus cum causa* was brought: Before the return of the writ the defendant died, and a *procedendo* was awarded; because by the 8 & 9 W. 3. c. 11. the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have in another court; and by this means he would be deprived of the effect of his judgment, which he cannot have in another court, which would be unreasonable. *H. 1 Ann. Anon. in B. R.*
1 *Salk.* 352.

2. An action of debt was brought against the defendant as a feme sole in the palace court; after appearance and plea pleaded she married, and then removes the cause in *B. R. per babeas corpus*; and *here* the plaintiff declares against her in the custody of the marshal. Defendant pleaded in abatement, she was married at the time of the *babeas corpus* sued out, and ruled a good plea; for here the proceedings are *de novo*, and the court takes no notice of the proceedings below, or of what precedes the *babeas*

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corpus; but the course in such case is to move the matter to the court upon the return of the *babeas corpus*, and the court will grant a *procedendo*; for though a *babeas corpus* be a writ of right, yet where it is to abate a rightful suit, the court may refuse it. *M. 6 Ann. Hetherington v. Reynolds in B. R. 1 Salk. 8.*

3. Motion for an *babeas corpus* to remove *Shute*, who was in a county gaol, upon an action of debt for 1000*l.* upon bond, by process out of the common pleas, and barbarously used by the gaoler. — *Per Twisden*, you should have moved in the common bench, and then he would have been sent to the *Fleet*. You may have an *babeas corpus* out of the crown side. But if the cause in the common bench be returned, we must remand him, though we may punish the gaoler. *E. 23 Car. 2. The King v. Pennystone, MS. Rep.*

4. On an *babeas corpus*, if the gaoler omit any of the causes, it is an escape for so much. *MS. Notes.*

5. The sheriff is not bound to bring up the prisoner upon an *babeas corpus*, unless reasonable charges be tendred him. *Hil. 20 & 21 Car. 2. Cox v. Dowl, in B. R. MS. Rep.*

6. A prisoner was brought up from *Oxford* gaol by *babeas corpus*, in order to be turned over to the king's bench prison; but the court refused to do it, because the sheriff was not paid the charges of bringing him up, and so he was remanded. *E. 6 Geo. 1. Anon. 1 Str. 308.*

7. On a motion against *Bambridge*, the warden of the *Fleet*, it was held, that if an *babeas corpus* is brought, he must obey it, though the party refuses to pay his fees, for he has a remedy for them. *M. 2 G. 2. Hopman v. Barber, 2 Str. 814.*

8. The

8. The sheriff had the defendant in execution on a *ca. sa.* plaintiff delivered him an *babeas corpus* to remove him to the king's bench prison. The sheriff upon this insisted to be paid his poundage on the execution before he part with the body of the defendant, and would have distinguished this case from the cases in *Salk.* 330, 331, 332, in as much as he had here actually executed the process; and those cases go only against his insisting to be paid before hand, and that there is nothing in the statutes 29 *Eliz.* c. 4. or 3 *G. 1. c. 15. s. 17.* against it, and offered on payment of his poundage to bring up the body. But the court said, they could not be making bargains with people to obey their process, which they would enforce an obedience to, and leave the sheriff to his *action of debt* for the fees, which was his *legal* remedy. It went off at last upon the sheriff's submitting to carry him to a judge's chambers; and *Foster J.* said, if he was brought to him, he would not turn him over, till the poundage was paid. *M. 20 G. 2. White v. Haugh, 2 Str. 1262.*

9. An action was brought in the sheriff of London's court against two partners; one brings an *babeas corpus*, and puts in bail for himself only. Motion for a *procedendo*, which was granted, for otherwise the plaintiff will be disabled to go on in either court. *T. 8 G. 1. Fry v. Carey, Str. 527.*

10. A *babeas corpus* (as I have been informed) lies to the cinque ports at the suit of the king, though not at the suit of a subject.

An habeas corpus cum causa returnable before the chief justice immediately.

GEORGE the second, &c. To the sheriff of *Middlesex*, greeting. We command you, that you have the body of *C. D.* detained in our prison under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he shall be called in the same, before our right trusty and well beloved *Wm.* Lord *Mansfield*, our chief justice, assigned to hold pleas in our court before us at his chamber situate in *Serjeants Inn* in *Chancery Lane*, immediately after the receipt of this writ, to do and receive all and singular those things, which our said chief justice shall then and there consider of him in this behalf. Witness, &c.

Note; Tho' the writ be returnable before the chief justice, yet any other judge of this court may commit the prisoner to the king's bench.

The form of a bail-piece on an habeas corpus, which is to be wrote on a special bail-piece.

Michaelmas term, &c.

— to wit. *A. B.* is delivered upon bail upon a *habeas corpus*,

To *John Doe* of London, gent.

and

Richard Roe of the same place, gent.

R. S. attorney.

at the suit of the plaintiff in the plaint.

Pay in term time 6s. 6d. in vacation 7s. 6d.
Duty 2s.

How

How to proceed against a prisoner, who removes himself from the *Fleet* to the king's bench, *vide* p. 367.

If the *habeas corpus* be not directed to the sheriff of a county, &c. be careful to learn the stile of the court, for which see *Bobun's English Lawyer*, p. 433.

For the form of an *habeas corpus ad testificandum*, see p. 160.

No *habeas corpus ad testificandum* to be granted either of the *civil* or *crown* side without an affidavit, that they are *material* witnesses. This is a general rule. See the case of *The King v. Layer*, M. 9 G. 1. in B. R. *Fortesc Rep.* 396. In this case *Eyre J.* said, he never granted one in a *civil* case at his chambers without an affidavit; and agreed a judge might grant one at his chambers on an affidavit; and in a *civil* case said, that sometimes they give security. *Ibid.* The affidavit must be made by the plaintiff or defendant, applying for the *habeas corpus*, and no one else.

The form of a procedendo (a).

(a) A suit once remanded

shall never afterwards be removed or

stayed before

judgment by

any writ what-

soever. See

Stat. 21 J. 1.

c. 23. sect. 3.

GEORGE, &c. To the mayor, aldermen and sheriffs of *London*, greeting. Although we lately by our writ commanded you, that you should have the body of *C. D.* detained in our prison under your custody, as it was said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name the said *C. D.* might be called in the same before our right trusty and well beloved *Wm. Lord Mansfield*, chief justice, assigned to hold pleas in our court before us, at

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his chambers situate in *Serjeants-Inn* in *Chancery-Lane*, immediately after the receipt of that writ, (here set forth the return of the *habeas corpus*) to do and receive all and singular those things, which our said chief justice should then and there consider of him in that behalf; yet we being now moved with certain causes in our court before us, command you and every of you, that in all complaints or suits against the said *C. D.* at the suit of *A. B.* in our court before you or any of you levied or affirmed, or before you or any of you now depending undetermined, you proceed with what speed you can in such manner, according to the law and custom of our kingdom of *England*, as you shall see proper, our said writ to you first thereupon directed to the contrary in any thing notwithstanding. Witness, &c.

A procedendo on a writ of habeas corpus, returnable in court,

This and the two following procedendo's are in the common pleas, but they may easily be made to serve for the king's bench, by observing the words of the first *procedendo*.

GEORGE the second, &c. To, &c. Whereas we by our writ lately commanded you, that you should have before our justices at *Westminster* on *Wednesday* next after, &c. (the return of the *habeas corpus*) the body of *C. D.* detained in our prison under your custody, as it was said, by whatsoever name he was called in the same, together with the day and cause of taking and detaining the said *C.* to do and receive what our said justices should consider of him in this behalf, yet for certain causes in this behalf moving our said justices at *Westminster*, we command you, that in all and singular suits and complaints against the said *C.* at

the suit of *A. B.* in our said court before you moved or depending, you proceed with effect, according to the law and custom of *England*, and the court aforesaid, notwithstanding our writ lately directed to you to the contrary. Witness, &c.

A procedendo to the palace court on a habeas corpus.

GEORGE the second, &c. To the judges of our court of our palace of *Westminster*, and to each of them, greeting. Whereas we by our writ lately commanded you, that you should have before *Sr. John Willes*, *knt.* our chief justice of the bench, at his chamber situate in *Serjeants Inn* in *Chancery-Lane*, *London*, immediately after the receipt of the said writ, the body of *C. D.* detained in our prison under your custody, as it was said, together with the day and cause of the taking and detaining him, by whatsoever name the said *C.* was called in the same, to do and receive what our said chief justice should consider of him in that behalf; yet certain causes in this behalf specially moving our justices of the bench aforesaid, we command you and each of you, that in all suits and complaints against the said *C.* at the suit of *A. B.* in our court before you moved or depending you proceed with effect, according to the law and custom of *England*, and the court aforesaid, notwithstanding any writ lately directed to you to the contrary. Witness, &c.

The like in another form.

GEORGE the second, &c. To, &c.
Whereas, &c. (reciting the *habeas corpus*, as before) We command you, that in all and singular pleas and plaints in our court before you against the said C. D. moved or depending, you proceed with effect, notwithstanding our said writ of *habeas corpus* to the contrary lately thereupon directed to you. Witness, &c.

(a) By Stat.

4 & 5 W. &

M. c. 21. it is

enacted, that

if any defen-

dant be taken

or charged in

custody at the

Proceedings against prisoners (a).

Of delivering a declaration.] Declaration to

be delivered before the end of the next term af-

ter

suit of any person, upon any writ or writs out of any of the courts at *Westminster*, and imprisoned for want of sureties for his appearance to the same, the plaintiff in such writ shall and may, before the end of the next term after such writ shall be returnable, declare against such prisoner in the court, out of which the writ or writs shall issue, whereupon the person shall be taken and imprisoned, or charged in custody, and shall or may cause a true copy thereof to be delivered to such prisoner, or to the gaoler or keeper of the prison, in whose custody such prisoner shall be or remain: To which declaration the said prisoner shall appear and plead; and if he shall not appear and plead to the same, the plaintiff in such case shall have judgment in such manner, as if the prisoner had appeared and refused to answer or plead to such declaration. And that in all declarations against any prisoner, detained in prison by writ or process issued out of the king's bench, it shall be alledged in the custody of what sheriff, bailiff or steward of any franchise, or other person having return and execution of writs, such prisoner shall be at the time of such declaration, by virtue of the process of the said court at the suit of the plaintiff, which allegation shall be as good and effectual, as if such prisoner was in the custody of the marshal of the *marshalsea*.
Note; The ancient practice of this court was, that after the plaintiff had arrested the defendant upon *mesne* process, and the defendant for want of bail was committed to gaol, unless the plaintiff did before the end of two

terms

ter the return of the process (b) or surrender in terms next discharge of bail to the keeper, gaoler or turn-key, and at the same time you ask him, if cause the defendant is his prisoner. The gaoler, &c, brought up by must deliver the declaration to the prisoner, or *habeas corpus*, and committed in order to a declaration is not to be delivered to a prisoner be charged with a declaration in custody before the return of the process, upon ration in custody of the marshal of the custody. See *Rule, E. 5 W. & M.*

marshal's, the defendant was upon filing common bail to be discharged.

(b) If any defendant shall be committed to the custody of the marshal of this court, or charged in custody of the said marshal, or arrested or committed by virtue of the process of this court to the custody of any sheriff or other officer whatsoever at the suit of any plaintiff, and shall so remain in the custody for two (*) terms, and the plaintiff shall not declare against such defendant within that time, that then such defendant, after the end of the second term after such imprisonment, shall be discharged out of the prison, where he shall be so detained, on filing common bail signed by one of the justices of this court, without giving notice to the plaintiff or his attorney.

Rule, T. 2 G. 1. (*) The term, in which the writ (whereon the defendant was arrested) is returnable, to be accounted one of the two terms, although the writ be returned on the last day of the term, and so likewise the term, wherein the defendant was committed to the custody of the marshal, is to be accounted one, although not committed till the last day of a vacation.

How to declare, when the defendant is in custody of a sheriff (c), and when in custody of the marshal of the king's bench prison.

(c) Where defendant is in custody of a sheriff, &c.

you say in the

1. *When in custody of a sheriff.*] Make declaration instead of, three copies of your declaration; one on treble being in cus-

Id. tody of the marshal, &c.

being in custody of the sheriff, &c. (naming the county, &c.) by virtue of his majesty's writ of *Lat.* (alias *capias* or *plur. capias*, as the case is) issuing out of this court against C. D. at the suit of the said A. B. of a plea, &c. If defendant is in the custody of the sheriff of *Middlesex*, you say, A. B. complaint

plaintiffs of C. D. 1 d. stamped parchment (a), called a bill, to be being in the custody of the sheriff of Middlesex, by virtue of a precept of our lord the king, called a bill of Middlesex, issued out of the court of our said lord the king before the king himself, at the suit of the said A. against the said C. Or you may say thus, issued out of this court here at the suit of the said A. against the said C. of a plea, &c. Here go on with the declaration, and add at the bottom before the pledges,

R. S. for the plaintiff.

Defendant, in custody of the sheriff of Middlesex.

(a) A bill or declaration on treble 1 d. stamped parchment ought first to be filed with the clerk of the declarations, before a copy of it is delivered to the prisoner. (b) Where a copy of a declaration is delivered to a keeper, gaoler or turnkey, it is necessary to set forth in the affidavit, that he acknowledged, that the defendant was a prisoner in the said gaol. But where the defendant is in custody of the marshal, no affidavit is required of the delivery of such copy, as it is, when the defendant is in custody of a sheriff, &c.

2. *When the defendant is in custody of the marshal of the king's bench prison.]* Make only two copies of your declaration, one on treble 1 d. stamped parchment to file with the clerk of the declaration, and another on treble 1 d. stamped paper to deliver to the turn-key, &c.

or prisoner himself; for in this case no affidavit of delivery of declaration is required, as it is where defendant is in custody of a sheriff; but a rule to plead may be given of course, and if a bill is filed, and a copy of a declaration be delivered 4 days exclusive before the end of the term, a rule to plead given, and plea demanded (which may be done on the back of the copy of the declaration delivered) defendant must plead as of that term; but if the bill be not filed, and copy of declaration delivered 4 days exclusive before the end of the term, the defendant may imparle until the next term.

When to appear and plead.] If defendant be arrested by *mesne* process out of this court, returnable the first day of *Easter* or *Michaelmas* term, and a copy of the declaration be delivered before *menssem Paschæ*, or *crastinum animarum*, and affidavit (a) of the delivery thereof be made and filed, and defendant does not appear before the end of 10 days after *Easter* or *Michaelmas* terms respectively, judgment may be entred against him, rules having been given; but if he appears before the end of 10 days after *Easter* or *Michaelmas* term, he shall imparle, unless the action be in *London* or *Middlesex*, and defendant be in prison within 40 miles of *London* or *Westminster*, then though he doth appear before the expiration of 10 days, as above, he shall plead 2 days before the essoin day of

(a) You make a copy of the affidavit on treble 6d. of the declaration on treble 1d. stamp, annex them together, and then file the original affidavit with the clerk of the rules, and take the copy of such affidavit with the declaration annexed, (both on proper stamps) to the master, and he will give a rule thereon for the defendant to appear and plead, which rule the clerk of the rules enters in his paper; and on default thereof, judgment may be signed.

the

the next term, and in default thereof, rules having been given, judgment may be entred against him, as aforesaid; but if a copy of a declaration be delivered on or after *menssem Pasche* in *Easter* term, or *crastinum animarum* in *Michaelmas* term, or in *Hilary* or *Trinity*, and thereupon the plaintiff gives rules to appear and answer; then if defendant appears two days before the effoin day of the next term, he shall imparle until the next term; but if he does not appear within that time, judgment may be signed.——But if a writ be returnable one term, and a copy of the declaration has been delivered before the effoin day of the next, the plaintiff in such next term may give rules to appear and plead; and if defendant does not appear and plead by the expiration of the rules, judgment may be entred. See *Rule, E. 5 W. & M.*

(a) The term in which the declaration shall be delivered, or the term wherein judgment shall be obtained, to be reckoned one.

Of issue, trial, judgment and execution.] If a plaintiff declares against a prisoner in the custody of the marshal of this court, or any sheriff or other officer, and shall not proceed to trial or judgment within three (a) terms next after such declaration delivered, or if any plaintiff shall obtain judgment in the court here in any action against any defendant, a prisoner, and shall not charge the said defendant so in prison remaining in execution (b) upon the judgment so obtained within two terms next after such judgment so had and obtained, then such

(b) If a defendant surrenders himself after judgment in discharge of his bail, the plaintiff must charge him in execution in two terms following, (the term, in which he surrenders, to be reckoned one) or defendant will be intitled to be discharged out of custody on filing common bail, except proceedings be staid by writ of error or injunction.

defendant

defendant so in prison remaining shall have leave to file common bail, or to sue out a writ of *superfedeas* out of the court here, according to the course of this court, for his discharge out of custody aforesaid, where he shall be so detained, to be granted by one of the justices of this court, if cause shall not be shewn to the contrary by the plaintiff or his attorney, upon notice (a) to them, or either of them, given by the attorney for the defendant, and oath of the said notice to be made, if the said plaintiff shall not appear before the judge aforesaid, to hinder filing the common bail aforesaid, or making the aforesaid writ of *superfedeas*. Rule, T. 2 Geo. 1.

(a) The notice here intended is a judge's summons to attend him, in order to shew cause, why the defendant

should not be discharged for the plaintiff's not declaring, &c. and the first summons is peremptory.

How to charge a prisoner in the king's bench prison in execution.] Get a rule from the clerk of the rules, pay 4s. 6d. serve the marshal with a copy, under which he will write his acknowledgment of defendant's being in his custody; pay him 10s. 6d. enter the *committitur* in the marshal's book, kept at Mr. Child's office in the king's bench office, pay 2s. file it with Mr. Heberdene, pay 2s.

How to discharge a prisoner for want of plaintiff's proceeding.] 1. For want of a declaration. If defendant be in the custody of a sheriff or other officer, get a certificate from the gaoler of the cause he is charged with, and a certificate from the clerk of the declaration, that no bill is filed against him, and thereupon make out a common bail-piece, with a *fiat* for a *superfedeas*, for a judge to sign, which you leave with Mr. Heberdene,

Heberdene, on his signing your *superfedeas*, and he delivers it over to the clerk of the common bails to be filed. Or you may proceed by taking out a judge's summons for plaintiff, to shew cause, why defendant should not be discharged for want of a declaration; which is the best method, when the defendant is in a county gaol, &c. but if the defendant is in custody of the marshal, get a certificate of the causes from the clerk of the papers of the king's bench prison, and a certificate from the clerk of the declarations, that no bill is filed in his office, and thereupon a judge will order common bail to be filed, and upon a certificate thereof from the clerk of the common bails the marshal will discharge the defendant *without a superfedeas*. 2dly, *for not proceeding to trial, judgment or execution*. Summon plaintiff to shew cause, why a *superfedeas* should not be granted, which, if no cause shewn to the contrary, the judge will grant on filing common bail; but if defendant is in custody of the marshal, then on summons, and no cause shewn to the contrary, the judge will order defendant to be discharged on filing com-

(a) Please to mon bail, without any writ of *superfedeas* (a). observe, that

if a prisoner be in custody of a sheriff or other officer, he must sue out a writ of *superfedeas*, for signing which the bail piece signed by one of the judges, is a warrant to Mr. *Heberdene*; but if defendant be in custody of the marshal, a certificate from the clerk of the common bails will be a sufficient warrant to discharge defendant without a *superfedeas*.

Of charging a defendant in custody of the marshal, with a declaration by way of detainer, (viz.) a new charge.] No declaration, whereby any prisoner shall be charged in the custody of the marshal, shall be sufficient cause of detaining such prisoner in custody, unless an affidavit, that

that the plaintiff's cause of action against such prisoner does amount to 10*l.* or upwards, shall be first made and filed with the clerk of the rules of this court, and the sum specified in such affidavit shall be indorsed by him upon such declaration, before leaving thereof with the turnkey. *Rule, E. 15 G. 2.*

Of charging a defendant in custody in Newgate, Ludgate, or any other county or city gaol.] When a defendant is in *Newgate, &c.* there must be a process to charge him in custody directed to the sheriff or sheriffs, as the case is.—After the defendant is properly charged in custody, you proceed against him, as before mentioned.

How to proceed against a prisoner in the Fleet, charged with a declaration, on his removing himself to the king's bench prison.] If a prisoner in the *Fleet* charged with declaration in the common pleas remove himself by *habeas corpus* to the king's bench prison, the plaintiff must proceed to judgment in the common pleas, and then carry him back by *habeas corpus ad satisfaciendum* to charge him in execution.

How on removal from the king's bench prison to the Fleet prison.] If a prisoner in custody of the marshal be charged with a declaration in this court, and he removes himself to the *Fleet*, the plaintiff must proceed to judgment in this court, and the defendant must be brought back by a *habeas corpus ad satisfaciendum*, to be charged in execution.

How

How on removal before a declaration delivered.]

If a defendant in the king's bench prison on process issuing out of this court removes himself by *babeas corpus* to the *Fleet*, before the plaintiff has declared against him, the plaintiff must in such case charge him with a declaration in the court of common pleas, for he cannot proceed further in this court, unless he brings the defendant back by *babeas corpus ad respondendum*.

Note; The term and number of the judgment roll must be indorsed on the *babeas corpus ad satisfaciendum*.

N O T E S.

1. If the defendant be superseded for want of proceedings before judgment, yet plaintiff may, after judgment obtained, take defendant in execution; *secus*, if defendant be superseded for want of charging in execution.

2. Prisoners removed from the *Fleet* to the king's bench shall not be set at liberty, till the fees due to the warden of the *Fleet*, be paid. *Rule, Hil. 14 Car. 1.*

3. Complaint was made against the marshal for refusing to let a prisoner go abroad upon a day rule. *Per Twisden*, he may refuse, except you give him good security against escapes, and so upon an *babeas corpus ad testificand'*. *Hil. 29 & 30 Car. 2. Anon. B. R. MS. Rep.*

4. Prisoners committed to the king's bench by *babeas corpus ad respondendum*, or *ad faciendum & recipiendum*, shall remain in custody for two days, notwithstanding any other writ of *babeas corpus* issuing out of any other court to the marshal delivered and allowed. *Rule, Hil. 5 W. & M.*

5. One

5. One in execution is not to have the benefit of the rules. 1 *Str.* 196.

6. Notice of trial to a turnkey good, as well as a declaration, within the reason of 4 & 5 *W. & M. c.* 21. *Hil.* 6 *G.* 1. *Whitehead v. Barber*, 1 *Str.* 248.

7. Where defendant is in custody, the declaration must be delivered to the turnkey before the end of the second term, or defendant may be discharged on common bail, though a declaration is left in the office in time; for unless the declaration be delivered to the turnkey, you cannot oblige defendant to plead, and plaintiff cannot sign a regular judgment, and therefore leaving it in the office is no delivery at all. *Per Cur.* *M.* 8 *Geo.* 1. *Greenhouse v. Cleever*, 1 *Str.* 474.

8. A prisoner must sign the petition for a day rule, before he goes at large. *Hil.* 8 *G.* 1. *Anon.* 1 *Str.* 503.

9. A warrant of attorney given by one in custody is not good, unless an attorney for defendant be present. *E.* 4 *G.* 2. 2 *Str.* 902. See *Rule E.* 15 *Car.* 2. *p.* 170. *note* 12.

10. Defendant being in custody, plaintiff obtained judgment, and instead of charging him in execution, whereby he would be intitled to be discharged on the Lords act, plaintiff brought debt upon the judgment, and charged him in custody. But when he had lain two terms after the judgment, the court discharged him on common bail, saying, it was a trick to deprive the defendant of the benefit of a merciful law. *M.* 6 *G.* 2. *Maud v. Brantbwaite*, 2 *Str.* 943.

11. A prisoner is taken in execution in the beginning of the term, who is afterwards suffered by the marshal to escape. The plaintiff finding

the *committitur* entered the *last* day of the term, prays the entry might be corrected, and made the 18th day of *May*, which was the very day he was committed. And the secondary saying, he entered all *committiturs* as the last day of the term, except a *special committitur* were desired by the attorney, and it appearing the attorney had done so in this case, the day was altered. *M. 29 Car. 2. Anon. MS. Rep.*

12. A warrant of attorney to confess judgment by a person in custody not binding, unless his attorney be present. *Rule, 15 Car. 2.*

The defendant's attorney in such case subscribes his name as a witness thus,

Sealed, &c.

A. B.

C. D. attorney for the said E. F.

13. Upon motion to supersede the defendant, as not being charged in execution in two terms, *Cur'* held, that the *committitur* must be actually entered on record before the end of the second term, and that there is no extension of the time to the continuance day after term, nor was it sufficient, that there was an entry in the marshal's book in time. *M. 18 G. 2. Unwin v. Kirchhoffe, Str. 1215.*

Mil. 4 Geo. 2. 14. Motion to discharge defendant out of execution, as being an ambassador's servant, viz. Widmore v. Alvarez. In his English secretary. Obj. he did not lie in the case of the French ambassador it was ruled, that the person need not lie in the house, but he must do some actual service there. Ibid.

void,

void, take in this case, and therefore the execution must be set aside. *E. 1 G. 2. Evans v. Higgs, Str. 797. Ld. Raym. 1524.*

15. If a defendant in custody of the marshal upon *mesne process* escapes, and is detained in custody of any sheriff upon an escape warrant, plaintiff must declare against the defendant in custody of such sheriff before the end of the second term after such taking and detaining, or a *superfedeas* may issue. *T. 6 Anne.*

16. One in custody on a criminal account cannot be charged in custody at the suit of a subject in any action without motion, and leave of the court; but if he be charged in execution, then he ought not to be discharged.

Affidavit of the delivery of a declaration against a prisoner.

In the king's bench.

A. B. plaintiff,
against

C. D. defendant.

E. F. of, &c. maketh oath, that this deponent did on the day of deliver unto the keeper, gaoler or turnkey of the county gaol of a true copy of the declaration hereunto annexed, and the said keeper, gaoler or turnkey then acknowledged the said defendant to be a prisoner in the said gaol; and this deponent saith, that the said defendant was arrested or charged in custody by virtue of a *lat.* appearing to this deponent to be issued out of this court, and returnable before the delivery of the said declaration.

Sworn, &c.

E. F.

B b a

In

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In the C. B. the same, only say, by virtue of a *ca.* or other process, as the case is.

Commitment-piece.

Middlesex, *A.* B. late of the parish of to wit. *A.* in the county of *Middlesex*, gent. is committed in execution to the custody of the marshal, &c. at the suit of C. D. for sixty pounds and fifteen shillings damages, there to remain until, &c.

R. S.
attorney.

Judgment of term in the
year of king George the second.

Roll 110.

Ejectment.

Of what things an ejectment will lie, & econt.

(a) An ejectment lies *pro communia pastura* generally, if joined with other lands, for he that has possession of the lands, has possession of the common, and the sheriff by giving possession of one, executes his writ as to the other. 1 Str. 54.

AN ejectment lies for common of pasture (a); of a stable; of an orchard; of a garden; of a college; an ejectment also lies *pro stagno*; & *pro gurgite*; also of a boilery of salt; of a coal-mine; for a beast-gate; *pro pastura centum ovium*; *pro prima tonsura*; *pro herbagio*; *pro rectoria*; *pro capella*, by the name of a messuage; for a house; of an hop-yard; of a chamber in the second story of such an house; of twenty acres of furze and heath; of a close called D. containing three acres of land; *pro quatuor molendinis*; *pro decem acris pisarum*; for an alder carr in Norfolk; for mountain in Ireland. Str. 71. *De parte domus.* An ejectment for a certain place, called the vestry in D. good; so for 10 acres

10 acres of wood and 10 acres of underwood. Ejectment lies for a messuage or burgage; *Pro quadam portione granarum & fæni*. Ejectment for a manor should describe the quantity and species of land contained therein. An ejectment lies not for a tēpement; lies not *de pannagio*, for *pannagium* is but the privilege of taking pannage; lies not of a rent or common appendant; nor *de quodam rivulo & aquæ cursu*; for it ought to be of so many acres of land *aqua cooperta*. An ejectment lies not *de piscaria* in such a river; nor of crofts; nor of a kitchen; nor of a close; nor of arable, nor pasture land, without shewing how much of one and how much of the other; nor *pro virgata terræ*. An ejectment *de omnibus & omnimodis decimis in decem acris in D.* without saying *garbarum, fæni, lanæ agnellorum*, or giving any other description of the nature and quality of the tithes, naught; but *pro quadam portione granarum & fæni*, good. An ejectment lies not of the fourth part of a meadow, without shewing the number of acres the meadow contains. Ejectment in Ireland *de castro, villa & terris in Kilbrough*, without expressing the number and certainty of acres, insufficient. Ejectment for 5 closes of land arable and pasture called *Long Furlong*, containing 10 acres, declaration ill; because it don't set forth how many acres of each. An ejectment *de uno messuagio sive tenemento* ill; but of a messuage or tenement called the *Black Swan*, held good. Ejectment *pro mineris carbonum in Durham*, not shewing how many, held good. An ejectment held good for 100 acres of waste, or *pro centum acris mentis*, ill for incertainty. But for 100 acres of Bogg in Ireland, held good. Ejectment for 10 acres of wood and 10 acres of underwood, good.

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Ejectment for a house, 10 acres of land and 20 acres of meadow, by the name of a house and 10 acres of meadow, ill.

The method of bringing an ejectment.] Get a blank declaration in ejectment *unstamped*, fill it up, and also as many blank declarations on treble 1 *d.* stamps, as there are tenants to be served; fill these up agreeable to your copy.

If the premisses lie in *London* or *Middlesex*, make the notice to appear the first day of the next term; for if made *generally*, the tenant in possession has the *whole* term to appear in; but if the tenements lie in any other county than *London* or *Middlesex*, make the notice to appear the next term *generally*.

Serve each declaration *personally* on the tenant or his wife before the *essoin* day of the term, and at the same time read the notice to the tenant, or else fully explain the nature thereof. *N. B.* Service on tenant's son, daughter or servant, is not good, unless the receipt thereof is acknowledged by the tenant, and an affidavit is made thereof.

Make affidavit of the service of declaration on treble 6 *d.* and annex thereto a copy of the declaration on treble 1 *d.* in order to move for judgment against the casual ejector; give these to counsel to move for judgment. The clerk of the rules keeps the affidavit and declaration on the motion, therefore remember to have a declaration filled up by you before motion, or you must pay for a copy.

When to move for judgment.] If tenements lie in *London* or *Middlesex*, and notice be to appear the first day, or the beginning of the term,

term, move for judgment the beginning of the term, and then tenant has 4 days *inclusive* next after the motion to appear in; but if you move late in the term, *Cur'* will allow him only one or two days, and sometimes order defendant to appear immediately, that plaintiff may be able to give notice of trial *within* term. But if you do not move before the last 4 days, tenant has until the 2 days before the effoin-day of the next subsequent term to appear. If notice be to appear *generally*, then he hath the whole term to appear. If the tenements lie in any other county than *London* or *Middlesex*, though declaration be delivered before the effoin-day of *Easter* or *Michaelmas* terms, yet tenant has 4 days after the end of the next issuable, *i. e. Hilary* or *Trinity*, term, to appear; and if in *Cumberland* or any other county, where the assizes are but once a year, the tenant has four days next after the end of the term preceding the assizes to appear. If term ends on *Wednesday*, tenant has all *Monday* next to appear. You must move for judgment the same term the tenant had notice to appear, or *Cur'* will not grant a rule; and in country ejectments you may move any time *within* the term, though it is often deferred till the latter end.

If you would compel an appearance, or have judgment, you must move for judgment against the casual ejector, though the attornies for plaintiff and defendant often agree to save the expence of the motion, on dividing the half guinea between them. But plaintiff's attorney ought to do this with great caution, lest by neglect of the motion he should be deceived by the defendant's not appearing. A general rule to plead in ejectment to be given with clerk of

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the rules before motion in court for judgment against the casual ejector. *Rule T. 18 Car. 2.* former rule, *Hil. 1649.*

Method of appearing.] Defendant's attorney must buy a blank rule of assent, (not stamp) fill it up, make the tenant, or whosoever appears, defendant, instead of the nominal defendant; write in the margin of the rule, *A. B.* against *C. D.* (the nominal defendant) for (naming the parcels) in the county of _____ on the demise of *E. F.* Then sign your name at the bottom of the rule as attorney or agent for the defendant, leaving room for the plaintiff's attorney to sign his name over you. Ingross the general issue, *not guilty*, with the new defendant's name, and annex it to the back of the rule, and so leave them at a judge's chambers. — If by original, you strike out the words in the rule, (*and file common bail*) and instead of (his *bill*) insert (*his writ*) in the rule; and instead of filing common bail you must enter an appearance with the proper filazer. Where a defendant enters into the common rule to confess lease, entry, and ouster, (*i. e.* actual ejectment) for so much of the tenements mentioned in the declaration, as are in his possession, or of his under-tenants, the attorney for defendant must forthwith deliver to plaintiff's attorney a note in writing of the tenement so in possession of such defendant, or his under-tenants. *T. 15 Car. 2.* If *A.* claims title to the premises, and would defend the action, but is not in possession thereof, you must move the court for him to be made defendant instead of the *nominal* defendant, but this with consent of the tenant in possession, unless 'tis his landlord.

How

How to draw up rule by consent.] Plaintiff's attorney takes the rule and plea from the judge's chambers; the judge having signed the rule, plaintiff's attorney or agent must first sign his name over defendant's attorney, then plaintiff's attorney takes the rule from plea, and carries it to the clerk of the rules, who will keep that rule, and therefrom draw up one other rule by consent.

Issue.] Draw your issue with a memorandum as in other cases; annex a copy of the above rule to the copy of the issue, and deliver it therewith to defendant's attorney. You charge nothing for the half rule,

Signing judgment against the casual ejector, for want of a plea.] Search all the judges books for plea and rule, if none filed, make an *incipitur* of the declaration on double 2s. 6d. stamped paper, and on a roll; carry these to Mr. Child, who on producing your rule for judgment will sign your judgment; pay him 3s. 6d. make out a writ of possession, sign it with Mr. Heberdene, pay 1s. 8d. sealing 7d.

N O T E S.

1. Formerly it was said, that an ejectment might be left with a servant, which is at this day allowed in the common pleas; but the Lord Hale altered the rule, and Holt thought it a very good alteration, and saw no reason why the common pleas should allow it, and said, the law had always been tender of a man's possession.

session. But it may be left with the wife. *E. 1 W. & M. in B. R. MS. Notes.*

2. Motion, that a suit in ejectment in this court may stay till costs upon a nonsuit in the common pleas upon the same title were paid. The court advised upon it; and afterwards this term the chief justice said, it was proposed to all the justices at *Serjeants inn*, and they thought it reasonable, as well where the former suit was in another, as in the same court, and that all the courts would be conformable in this matter. *T. 36 Car. 2. B. R. Anon. MS. Rep.*

3. Ejectment. Lessee for three years makes a lease for five years to A. who brings the action, and this is specially found. *Hale*, the plaintiff cannot maintain his ejectment, for there is no such lease as he declares upon, for the lessor having but an interest for three years, cannot make a lease for five years; and if the lessee recover, he must recover a term of five years, or nothing, for judgment for a lesser term will not be warranted by the declaration. *T. 27 Car. 2. Jones v. Drinkwater, MS. Rep.*

4. In ejectment wherein a special verdict, and before judgment the term expires. Motion to enlarge the term. *Cur'*: You may have execution for your damages and costs, but we never enlarge the term without consent of parties. *E. 27 Car. 2. Waters v. Rumsey, MS. Rep.*

This rule was made for prevention of maintenance and brocage.

5. No attorney to be lessee in ejectment. *Rule, M. 1654. f. 1.*

6. Declarations in ejectment are not amendable. *MS. Notes.*

7. *Cur'* declared, that a declaration in ejectment was so far a process of the court, that they would punish contemptuous words on the delivery

livery of it as a contempt of the court. *T. 9 G. 1. Dominus Rex v. Unitt, 1 Str. 567. vide 260.*

8. In ejectment the plaintiff was nonsuited. He has his election to pay costs to which defendant he pleases. *1 Str. 516.*

9. Casual ejector cannot confess judgment. *M. 9 G. 1. Hooper v. Dale, Str. 531.*

10. Lord Coningsby brought an ejectment, and had a rule for trial *at bar*; but it being upon the demise of a wrong person, he delivered *new* ejectments; and coming again for a trial *at bar*, the court would not grant it but upon payment of costs of the *former* ejectment. *Hil. 9 G. 1. Lord Coningsby's case, 1 Str. 548.* — Afterwards, *Hil. 12 G. 1. Short v. King, Cur'* refused to stay proceedings till payment of costs in a *former* ejectment, saying, it was never done but where it appeared the party was vexatious, or had run defendant to a great expence, which was Lord Coningsby's case, who came for a trial *at bar* on his *new* ejectment after the *former* cause was ready for the *bar*, which was a matter of mere favour, in which they, (*i. e.* the court) might make their own terms. *Str. 681.*

11. Upon an affidavit, that deponents had tendered a declaration in ejectment, and that the servants refused to call their master, or receive it, saying, that they had orders to take no papers; leaving it at the house, was ordered to be sufficient. *Douglas v. — Mich. T. 10 Geo. 2. Str. 575.*

12. Ejectment for a house in the parish of St. Peter in *Warda de Cheape*, defendant proved it was in *Warda de Farringdon infra*, and that no part of the parish of St. Peter was in the ward of *Cheape*, and the plaintiff was nonsuit.

At

At Guildhall, coram King C. J. inter Boddy v. Smith, T. 10 G. 1. Str. 595.

13. In ejectment a man may either *make* or defend a title by 20 years possession. Said *per Cur'*. M. 11 G. 1. Str. 609.

14. Motion on affidavit, that the tenant in possession was a material witness for the landlord, that therefore the landlord might be made a defendant in the room of the tenant in possession. *Per Cur'*: He is liable for the *mesne* profits. The declaration is regularly delivered to the tenant in possession. It was never done in this court, though it was said, it had been done in C. P. T. 11 G. 1. Bourne v. Turner, Str. 632.

15. Proceedings stayed till notice given where the lessors live. Str. 681.

16. The lessor of the plaintiff, being an *infant*, the court obliged him to name a good plaintiff, who might be answerable for *costs*. E. 12 G. 1. Noke v. Windham, Str. 694.

17. In ejectment against two defendants it was said, that they *intravit, expulit & amovit*, and after verdict *pro quer'* on motion in arrest of judgment, *Cur'* held it to be ill; but at another day they ordered it to be amended, though there was nothing to amend it by, on the authority of Cro. Jac. 306. Salk. 48. and then the plaintiff had judgment. T. 2 G. 2. Mittit v. Denny, 2 Str. 807.

18. Ejectment lies not for a tenement. Str. 834.

19. Where there are two demises of different lands, judgment to recover *his term*, in the singular number, is sufficient, for there is but *one term* in each part of the premisses. T. 3 G. 2. Worral v. Bent & al', Str. 835.

20. After

20. After judgment against the casual ejector, and before any writ of possession executed, *Cur'* made a rule to stay proceedings on payment of all rent due and costs, it not being pretended, that the ejectment was brought on any other title, then a re-entry for non-payment of rent. *E. 4 G. 2. Goldtitle v. Holdfast, 2 Str. 900.*

21. In ejectment *Cur'* denied to let the parson of *Hampstead* chapel defend only for a right to enter and perform divine service, notwithstanding *Salk. 256.* saying, it had been often denied since. *T. 5 G. 2. Martin v. Davis, Str. 914.*

22. Where judgment is against the casual ejector, the title may be gone into in an action of trespass for *mesne* profits. *Str. 960.*

23. Judgment in ejectment set aside, though strictly regular, plaintiff not having lost any trial, and defendant offering to pay costs, and take notice of trial. *E. 7 G. 2. Dobbs v. Potter, 2 Str. 975.*

24. The notice in ejectment was to appear on the escoin-day of this term, and held ill, for it should be to appear the first day in full term, which is the appearance-day. *T. 9 G. 2. Holdfast v. Freeman & al, 2 Str. 1049.*

25. In ejectment on demise of Lord Gower, it was held no cause of challenge, that a knight was not returned on the jury, according to the case of *Holbourn v. Kingston in the house of lords, M. 9 G. 2. Goodtitle v. Thrustout, Str. 1023.*

26. Upon a special verdict in ejectment it appeared, that the lessor of the plaintiff claimed as tenant for life, and upon an affidavit of his death it was moved, that all proceedings might stay, since it could signify nothing to argue it upon

upon the merits. *Cur'*: Though the possession cannot be obtained, yet plaintiff has a right to proceed for damages and costs. All that we can do is to oblige him to give security for costs, now the lessor is dead, as we do in the case of infant lessors, who cannot enter into the common rule. *M. 10 G. 2. Thurston, on the demise of Turner, v. Grey & al'*, 2 *Str.* 1056.

27. The lessors of the plaintiff delivered three ejectments in *C. B.* and two in *B. R.* for the same tenements, and made the defendants attend at 5 assizes, but countermanded in time to save costs. Motion to stay proceedings in the last ejectment; till costs paid of the former, on account of the vexation; but the court would not do it, inasmuch as costs were not demandable by the rules of the court. *T. 12 G. 2. Thurstout v. Troublesome, ex demiss. Parke & ux'*, 2 *Str.* 1099.

28. New trial may be had in ejectment and after a trial at bar. *Str.* 1105.

29. The defendant in ejectment obtained a trial at bar, on consenting to pay bar-costs, and receive *nisi prius* costs. After this the lessor was admitted *in forma pauperis*, and had a verdict against him; and now having brought a new ejectment, it was moved, that the master might tax costs, in order to ground a further motion to stay his proceedings in the second ejectment; but the court refused to make any rule, saying, every man had a right to a second trial before ejectments were introduced, and might bring a writ of right after a verdict in assize; and they could not construe the rule as a consent on his part to pay costs in all events, but only as terms put upon the defendant; that the regular way when a pauper was vexatious, was

to dispauper him, but they could not think he was so in the present case. *M. 13 G. 2. Brittain v. Greenville, 2 Str. 1121.*

30. In ejectment for mines the possession of the manor is no evidence. *2 Str. 1142.*

31. Ten declarations on the same demise were delivered for ten houses in the occupation of ten persons; motion to have them all put into one issue, suggesting, that the title was the same in all. *Cur'* refused to do it, saying, the lessor might have sued them at ten different times, and it would be obliging him to go on against all, when perhaps he might be ready in some of them only. *Hil. 14 G. 2. Smith v. Crabb, 2 Str. 1149.*

32. Declaration in ejectment not amendable, the court considering it as a process. *2 Str. 1211.*

33. No relief against defendants refusing to appear, and make defence in ejectment. *2 Str. 830.* But see *Stat. 11 G. 2. c. 19. sect. 13.* and the construction of the court upon this statute in the following case. By the statute *11 G. 2. c. 19.* it is provided, that the landlord may make himself a defendant in ejectment, though the tenant refuses to appear; and though judgment is signed against the casual ejector, the court shall order a stay of execution, "*until they make further order therein.*" In this case the landlord appeared without the tenant; and after a verdict for plaintiff he brought error; upon which plaintiff moved to take out execution, which *Cur'* refused to grant, for though it is left to their discretion, yet that can only be a legal one. The act intended to put the landlord in the place of the tenant, that he should not be stripped by any act of the tenant; and it ought to be considered as if the tenant had brought

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brought error, which would undoubtedly be a *superfedeas*. This court cannot take upon them to judge whether there is error in the proceedings or not. *M. 19 G. 2. Jones v. Edwards, 2 Str. 1241.*

34. The term in ejectment being near expiring, it was amended without any consent from 5 years to 10 years. *T. 21 G. 2. Oats v. Shepherd, 2 Str. 1272.*

Affidavit of service of declaration in ejectment.

In the king's bench.

Between { *A. B. plaintiff,*
and
C. D. defendant.

A. B. of maketh oath, that he this deponent did on the day of last deliver a true copy of the declaration hereto annexed unto *G. H.* tenant in possession of the premisses in the said declaration mentioned, on which copy was written a notice to the said *G. H.* purporting, that unless he did appear by some attorney of the king's bench this present *Hilary* term, judgment would be signed against the casual ejector by default, and he would be turned out of possession, and at the same time this deponent acquainted the said *G. H.* of the intent and meaning of the said declaration and notice.

Sworn, &c.

A. B.

Affidavit

Affidavit of the tenant's refusing to defend an ejectment in order to have the landlord admitted defendant.

King's bench.

A. B. lessee of C. D. against E. F.

T W. of maketh oath, that he this deponent did this day of by the direction of G. H. landlord of the premises in question in this cause, apply to I. K. tenant in possession of the said premises, to know whether he the said I. K. would appear and become defendant in this cause, or would permit the said G. H. to defend his title to the said I. K. and this deponent at the same time shewed and offered to deliver unto the said I. K. a note signed by the said G. H. whereby the said G. H. promised to defend and keep the said I. K. harmless of, from and against all costs and charges in this cause, and the said I. K. told this deponent, that he would not appear and become defendant in this cause, or any ways concern himself therein.

Ejectment by original.

SOME attornies chuse to proceed in ejectment by *original*, on account of the difficulty and expence a defendant may be at in obtaining and proceeding upon a writ of error in parliament, to reverse the judgment, for a writ of error in this case cannot be brought, or at least

returnable, but when the parliament is sitting, which is of great use for the speedy getting into possession of the premisses.

It is generally held, that if there be a parliament in being, as by *adjournment* or *prorogation*, though not actually sitting, yet a writ of error returnable in parliament time may be sued out, and that the shewing the same to the plaintiff's attorney is a *supersedeas*. Others think it ought to be first allowed.

But that honourable court is of so high a nature, that great care ought to be taken to pay due obedience to any process returnable there.

(a) The practice of suing out a *lat.* is now disused.

As you ought to have a *lat.* (a) to warrant your ejectment brought in the usual way by bill in the country, so when you proceed this way, you ought to have an original, which is the foundation of the action.

How to sue out an original.] Draw a *præcipe*, carry it to the curfitor of the county, where the land lies, and he will make out the original.

Return of the original.] The original must be returnable on a general return-day, and may be the first return of the term, which your declaration is of.

Note; If you have judgment against the casual ejector, for that the tenant doth not enter into a rule and plead, then your original must be against the casual ejector; but if the tenant appear and plead, then your original must be against the tenant.

Return

Return of original by the sheriff.] Get your original returned by the sheriff; but it is usual for the plaintiff's attorney to return it.

Filing original.] After the original is returned, it ought to be filed with the *custos breviarum* of this court.

Serving declaration.] Buy a blank declaration, fill it up, and serve it before the effoin-day of the ensuing term.

Motion for judgment against casual ejector.] Make affidavit of service of declaration (a), (a) *Vide p.* and move for judgment against the casual ejector.

Drawing rule.] Draw the rule; if the tenant do not appear, and leave a rule at the judge's chambers; *vide p.*

The rule by consent on an original is the same as the rule *p.* 393. only you leave out the words (*and put in common bail*), and instead of the word (*bill*) insert (*writ*).

If the rule be left, then take it from the judge's chambers, and enter it with the clerk of the rules, as mentioned *p.*

Declaring de novo, and delivering declaration to defendant's attorney.] Write your declaration *de novo*, copy-wise. The declaration must be of the same term the issue is of, *i. e.* of *Hilary*, your first declaration being of *Michaelmas*; and instead of *C. D.* the casual ejector, your first defendant, you must put in the name of the new defendant mentioned in the rule left at the judge's chambers, and defendant's addition, for

The present Practice of the

that is necessary in this case, and so alter the declaration throughout as to the defendant's name, and leave out the notice to the tenant; deliver defendant's attorney a copy of this declaration on treble *1d.* stamped paper; charging on the back for the same.

Plea.] To this declaration the defendant's attorney must plead not guilty.

Issue.] Draw up the issue; and here please to observe, that you leave out, *Be it remembered, &c.* and begin as the declaration begins.

Deliver a copy of the issue to defendant's attorney; charge on the back *8d. pr.* sheet, and for entering plea and warrant of attorney *2s. 8d.* which defendant's attorney must pay.—He should pay for entering the rule *2s.* it being his rule, and not the plaintiff's.

Notice of trial.] Give notice of trial, as before mentioned *p.*

Venire, distr. &c.] In proceedings in ejectment by original the *venire*, &c. and all other writs as well before the trial as the writ of possession, and other executory writs after the trial, must be returnable on a general return.

Make out your *venire* and *distringas*; which get returned by the under-sheriff. The *distringas* must be returnable the first general return of the ensuing term.

Record.

Record.

Of making up the record.] Make up the record, of which the first *placita* must be exactly the same as by bill; only you must leave out the memorandum, and begin with the declaration, as you did in the issue.

After you have ingrossed the declaration and plea, and the second *placita*, (which is the same as the first) is inserted, you enter the *jurata* thus:

Middlesex. **T**HE jury between *A. B.* by his attorney, plaintiff, and *C. D.* (addition as in the declaration) of a plea of trespass and ejectment of farm, is respited before our lord the king, wheresoever our said lord the king shall then be in *England*, until, &c. the return of the *distringas*. Rest as in other *juratas*.

Seal the record at the *nisi prius* office *Gray's Inn*.

Postea.] After trial (if at the assizes) call for the record with the *postea* indorsed. If the cause be tried in *London* or *Middlesex*, you take the record and *distringas* home with you, after the trial is over, and indorse the *postea* on the record yourself.

Final judgment.] Give a rule on the *postea*, tax costs and sign final judgment, and take out a writ of possession.

The present Practice of the

Declaration in ejectment in B. R.

Trinity term in the year of king George
the second.

Middlesex. *A. B.* complains of *C. D.* in the
custody of the marshal, and so
forth, for that, to wit, that whereas *E. F.*
gent. on the 25th day of *April* in the
year of, &c. at *Westminster* in the county of
Middlesex had demised and granted, and to
farm let to the said *A. B.* six messuages, (*reciting*
the parcels) with the appurtenances, situate,
lying and being in the parish of (*the place where*
the premisses lie) in the county aforesaid, to have
and to hold the said tenements with the appur-
tenances aforesaid to the said *A. B.* and his
assigns, from the 24th day of *April* then last
past, unto the full end and term of five years
thence next ensuing, and fully to be complete
and ended, by virtue of which said demise the
said *A. B.* entered into the said tenements with
the appurtenances, and was possessed thereof, until
the said *C. D.* afterwards, to wit, on the
day of in the year aforesaid, with
force and arms, and so forth, entered on the tene-
ments aforesaid with the appurtenances in and
upon the possession of the said *A. B.* and ejected,
drove out and amoved the said *A. B.* from his
said farm, his said term not being yet ended,
and kept out, and still keeps out the said *A. B.*
so ejected, drove out and amoved from his said
possession, and then and there did other injuries
to him, against the peace of our lord the now
king,

king, and to the damage of the said *A. B.* of ten pounds; and thereupon he brings suit, and so forth.

I. M. attorney for the plaintiff.	} Pledges to for prosecute	{ <i>John Doe</i> and <i>Richard Roe.</i>
the defendant.		

Notice for the tenant in possession.

Mr. *E. F.*

I am informed, that you are in possession of, or claim title to, the premisses in this declaration mentioned, or to some part thereof, and I being sued in this action as a casual ejector, and having no claim or title to the said premisses, do advise you to appear on the first day of next *Michaelmas* term in his majesty's court of king's bench at *Westminster*, by some attorney of that court, and then and there by rule of the same court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession.

Dated the day
of 1759. Your humble servant

G. D.

C 4 Declaration

*Declaration in ejeement in the common pleas.**Pacey.*

Trinity term in the year of king *George*
the second.

Middlesex, *JOHN Doe*, late of the parish of
to wit. in the county of *Middlesex*,

yeoman, was attached to answer *Richard Roe*, of
a plea, wherefore with force and arms he entered
into two messuages (a) with the appurtenances in
the parish of (or *parishes* of and

(a) If of
manors, mes-
suages, &c.

say, He entered
into the manors

of C. D. and

H. and two
messuages,

barns,

stables, gar-
dens, cot-

tages, two
water corn-

mills, one
windmill,

acres of
land, acres

of meadow,

acres of
pasture,

acres of wood,

acres of
furze and

beath, with
the appur-

tenances, &c.
(b) Manors
and

A. B. and *C. D.* demised to the said *Richard* for
a term, which is not yet expired, and ejeeted
him from his said farm, and other wrongs to
him did, to the great damage of the said *Richard*,

and against the peace of our sovereign lord the
king; and whereupon the said *Richard* by

his attorney complaineth, that whereas the said
A. and *B.* on the 2d day of *April* in the
year of the reign of his said majesty, at the said

parish of in the county aforesaid, (if the
lands lie in diverse parishes, say, at *Westminster*
in the county aforesaid) had demised to the said

Richard the said (manors and) tenements with
the appurtenances; to have and to hold the
said (b) tenements with the appurtenances to the

said *Richard* and his assigns, from the first day
of *April* aforesaid in the year aforesaid, until
the full end and term of five years thence next

ensuing, and fully to be compleat and ended;
by virtue of which demise the said *Richard*
entered

entered into the said (a) tenements with the ap-^{(a) Manors} purtenances, and was possessed thereof; and the said *Richard* being so possessed thereof, the said *John* afterwards, to wit, on the said 2d day of *April* in the said year, with force and arms, &c. entered into the said (b) tenements ^{(b) Manors} with the appurtenances, which the said *A.* and *B.* had demised to the said *Richard* in form aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *Richard* from his said farm, and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereupon the said *Richard* saith, that he is injured, and hath damage to the value of 20*l.* and thereof he bringeth suit, &c.

The notice is the same as in *B. R.* only say, the court of common pleas at, &c. instead of king's bench.

Rule by consent in ejectment.

Michaelmas term in the year of king *George* the second.

IT is ordered on the assent of the attornies of *A. B.* against both parties, that *G. H.* be made defendant *C. D.* for in the place of the now defendant *C. D.* and that ^{(naming the parcels) in the county of —} he shall appear immediately at the suit of the plaintiff, and put in common bail, and shall receive a declaration in a plea of trespass and ejectment of farm for the tenements in question, and shall immediately plead not guilty thereto, and upon trial of the issue shall confess lease, entry and actual ejectment, and insist upon the title only, otherwise judgment shall be entered for

for the plaintiff against the now defendant C. D. by default; and if upon the trial of the said issue the said G. H. shall not confess lease, entry and actual ejectment, by which the said plaintiff shall not be able further to prosecute his bill against the said G. H. then no costs or charges shall be adjudged upon such *nonpros*, but the said G. H. shall pay to the plaintiff his costs or charges thereon to be taxed; and it is further ordered, that if upon trial of the said issue a verdict shall be given for the said G. H. or if it shall happen, that the said plaintiff shall not further prosecute his said bill for any other cause, than for not confessing lease, entry and actual ejectment aforesaid, that then the lessor of the plaintiff shall pay the said G. H. his costs and charges in that behalf, to be adjudged, and so forth.

for the plaintiff.

for the defendant.

A nisi prius record in ejectment.

Pleas before our lord the king at Westminster of the term of in the year of the reign of our sovereign lord George the second, now king of Great Britain, and so forth.

Roll

Middlesex, **B**E it remembered, that on to wit. **B** next after, &c. (the first day of the term) in this same term before our lord the king at *Westminster* came A. B. by R. S. his attorney, and brought here into the court of our lord the king there his certain bill against C. D. being

being in the custody of the marshal, and so forth, of a plea of trespass and ejectment of farm, and there are pledges of prosecuting (to wit) *John Doe* and *Richard Roe*, which said bill follows in these words, *Middlesex*, to wit, *A. B.* complains of *C. D.* being in the custody of the marshal of the *marshalsea* of our lord the king, before the king himself, for that, to wit, that whereas *E. F.* gentleman, on the day of in the year of the reign of our sovereign lord *George* the second, now king of *Great Britain*, and so forth, at the parish of *St. George the martyr* in the county of *Middlesex*, had demised, granted and to farm let to the said *A. B.* twenty messuages with the appurtenances, situate, lying and being in the said parish of *St. George the martyr* in the said county of *Middlesex*, to have and to hold the said messuages with the appurtenances to the said *A.* and his assigns from the day of *December* then last past, unto the full end and term of five years from thence next ensuing and fully to be completed and ended; by virtue of which demise the said *A.* entered into the said messuages with the appurtenances, and was possessed thereof, until the said *C.* afterwards, to wit, on the said of *January* in the year aforesaid, with force and arms, and so forth, entered on the messuages aforesaid, with the appurtenances, in and upon the possession of the said *A.* and ejected, drove out and moved the said *A.* from his said farm, his said term not being yet expired, and thereupon kept out, and still keeps out from his said possession, the said *A.* so ejected, drove out and moved, and then and there did other injuries to the said *A.* against the peace of the present king, and

and to the damage of the said *A.* of ten pounds; and therefore he brings suit, and so forth.

And the said *C.* by *J. P.* his attorney, comes and defends the force, injury and damages, and whatever else he ought to defend, when and where the court will take the same into consideration, and saith, that he is in nothing guilty of the trespass and ejectment aforesaid, as the said *A.* above complains against him; and of this he puts himself upon the country, and the said *A.* likewise; therefore let a jury thereupon come before our lord the king at *Westminster* on next, &c. and who are in no wise a-kin either to the said *A.* or to the said *C.* to take cognizance upon their oaths of the whole truth of the premisses, because as well the said *C.* as the said *A.* have put themselves upon that jury. The same day is given to the parties aforesaid at the same place.

Jurata.

Pleas before our lord the king at *Westminster* of the term of _____ in the year of _____ the reign of our sovereign lord *George* the second, now king of *Great Britain*, and so forth.

Middlesex, **T**HE jury between *A. B.* plaintiff, to wit. _____ by his attorney, and *C. D.* defendant, of a plea of trespass and ejectment of farm, is respited before our lord the king at *Westminster*, until _____ next after, &c. unless the king's right trusty and well beloved *Wm.* lord *Mansfield*, his chief justice, assigned to hold pleas before the king himself, shall first come on

Friday

Friday the 17th day of *June* at *Westminster-Hall* in the county of *Middlesex* aforesaid, according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the said jurors to make the said jury between the parties aforesaid of the plea aforesaid accordingly. The same day is given to the parties aforesaid at the same place.

Issue on declaration by original upon two several demises.

Easter term in the *17th* year of king *George* the second.

Middlesex, *A. B.* late of *B.* in the county aforesaid, gent. was attached to answer *C. D.* esq; of a plea, wherefore with force and arms into six messuages, six cottages, sixty acres of land, sixty acres of meadow, three hundred acres of pasture, and forty acres of wood-land, with the appurtenances, in the parish of *B.* in the said county of *Middlesex*, which *E. F.* and *G.* his wife had demised to the said *C.* for a term which is not yet expired, and into six other messuages, six other cottages, sixty other acres of land, sixty other acres of meadow, and three hundred other acres of pasture, and forty other acres of wood-land, with the appurtenances in the said parish of *B.* which *I. L.* the younger had demised to the said *C.* for a term which is not yet expired, he entred and ejected him the said *C.* from his said farms, and did other injuries to him, to the great damage of the

First demise.

the said C. and against the peace of the present king, and so forth, and from whence the said C. by C. S. his attorney, complains, that whereas the said E. F. and G. his wife on the first of *April* in the year of the reign of our sovereign lord the present king of *Great Britain*, and so forth, at the said parish of *B.* had granted to the said C. the said six messuages, six cottages, sixty acres of land, sixty acres of meadow, three hundred acres of pasture and forty acres of wood-land, with the appurtenances, to have and enjoy the said tenements with the appurtenances, to the said C. and his assigns, from the twenty-fifth day of *March* then last past, unto the full end and term of five years thence next ensuing and fully to be completed and ended, by virtue of which said demise the said C. entered into the said last mentioned tenements with the appurtenances, and was thereof possessed; and also that whereas the said *J. L.* on the said first day of *April* in the year aforesaid at the said parish of *B.* had demised to the said C. the said six other messuages, six other cottages, sixty other acres of land, sixty other acres of meadow, three hundred other acres of pasture, and forty other acres of wood-land with the appurtenances, to have and enjoy those tenements with the appurtenances to the said C. and his assigns, from the said 25th day of *March* then last past, unto the full end and term of five terms from thence next ensuing and fully to be compleat and ended; by virtue of which demise the said C. entered into the said last mentioned tenements with the appurtenances, and was thereof possessed, and being so thereof possessed, and also being possessed of the several tenements aforesaid with the appurtenances as aforesaid, the said *A.* afterwards,

Second demise.

to wit, on the said first day of *April* in the year aforesaid, with force and arms, and so forth, entered into the said tenements with the appurtenances, which the said *E.* and *G.* his wife had in form aforesaid demised to the said *C. D.* for the said term first above mentioned, which is not yet expired, and into the said tenements with the appurtenances, which the said *F. L.* had in form aforesaid demised to the said *C. D.* for the said term last above mentioned, which is not yet expired, and ejected him the said *C. D.* in form aforesaid, and other injuries, and so forth, to the great damage, and so forth, and against the peace, and so forth; from whence he says, that he is injured, and has damage to the value of one hundred pounds; and therefore he brings suit, and so forth.

And the said *A. B.* by *J. P.* his attorney General issue, comes and defends the force and injury when, and so forth, and says, that he is in nothing guilty of the trespass and ejectment aforesaid, as the said *C.* above complains against him; and of this he puts himself upon the country, and the said *A.* likewise, and so forth. It is therefore *Veuire* commanded to the sheriff, that he cause to awarded, come before our lord the king on, &c. where-soever, and so forth, twelve, and so forth, by whom, and so forth, and who neither, and so forth, to recognize, and so forth, because as well, and so forth. The same day is given to the parties aforesaid, and so forth.

Judgment

*Judgment in ejectment by original, against
the casual ejector by nil dicit.*

AND the said C. D. by J. P. his attorney, comes and defends the force and injury, when, and so forth, and says nothing in bar or preclusion of the action of the said A. B. but made default, by which the said A. remains undefended upon that occasion against the said C. for which it is considered, that the said A. recover against the said C. his term yet to come of and in the said tenements with the appurtenances; and upon this the said A. freely here in court remits to the said C. all such damages, costs and charges, as he the said A. has sustained by occasion of the premises, or as can be adjudged to him in this behalf; therefore the said C. may be free from these damages, costs and charges, and so forth; and upon this the said A. prays the writ of our lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his said term yet to come of and in the said tenements with the appurtenances; and it is granted him, returnable, &c.

*Judgment in ejectment by original, by non
informatus.*

AND the said C. D. by S. S. his attorney, comes and defends the force and injury, when, and so forth; and upon this the said A. prays, that the said C. may answer his said declaration, upon which the said attorney of the said C. says, that he is not informed by the
said

said C. of any answer to be given for the said C. to
 the said A. in the said plaint, and he says not any
 other thing (a) thereupon in bar or preclusion of (a) Or any
 the said action of the said A. by which the said A. thing else.
 remains undefended upon that occasion against
 the said C. for which it is considered, that the said
 A. recover against the said C. the possession of
 his said term yet to come of and in the said
 tenements, with the appurtenances, and his
 damages by occasion of the said trespass and
 ejectment; but because it is unknown what
 damages the said A. has sustained by occasion
 of the said trespass and ejectment, it is com- Inquiry
 manded to the sheriff, that by the oath of awarded.
 twelve good and lawful men of his bailiwick he Note; Error
 diligently inquire what damages the said A. has in ejectment
 sustained, as well by occasion of the said trespass lies before
 and ejectment, as for his costs and charges by inquiry exe-
 him about his suit in this behalf expended; and cuted.
 that the inquisition which, and so forth, the
 sheriff do make appear to our lord the king
 from the day, &c. (the return) wheresoever, and
 so forth, under his seal, and so forth, and the
 seals, and so forth; the same day is given to the
 said A. and so forth; and upon this the said A.
 prays the writ of our lord the king, to be di-
 rected to the sheriff of the county aforesaid, to
 cause him to have possession of his said term
 yet to come of and in the said tenements, with
 the appurtenances; and it is granted to him,
 returnable, and so forth.

Judgment by nil dicit against the casual ejector, with an imparlance to the next term after the declaration.

AND now at this day, to wit, next after (the first day of the next term) to which day the said C. D. had leave to imparle to the said bill, and then to answer, and so forth, before our lord the king at *Westminster* came the said A. B. by his attorney aforesaid; and the said A. B. prays, that the said C. D. may answer to his said declaration; and the said C. D. although at the same day solemnly required, comes not, neither does he say any thing in bar or preclusion of the said action of the said A. B. whereby the said A. B. remains thereof undefended against the said C. D. and so forth; It is therefore considered, that the said A. B. do recover against the said C. D. his term yet to come of and in the said tenements with the appurtenances, and also his damages by occasion of the said trespass and ejectment; and upon this the said A. B. freely here in court remits to the said C. D. as well all such damages, costs and charges, as may be adjudged to the said A. B. in this behalf, as all judgments and executions for the said damages, costs and charges. Therefore let the said C. D. be discharged from the said damages, costs and charges; and the said A. B. craves the writ of our lord the king, to be directed to the sheriff of to cause him to have possession of his said term yet to come of and in the said tenements, with the appurtenances; and it is granted to him returnable before our lord the king

*Remittit
dampna.*

king at *Westminster* on next after
The same day is given to the said *A. B.* there,
and so forth.

*Judgment of the same term with the de-
claration.*

AND the said *C. D.* by his attorney
comes and defends the force and injury when,
and so forth, and says nothing in bar or preclusion
of the said action of the said *A. B.* but made de-
fault, whereby the said *A. B.* remains thereof
undefended (as before).

A writ of possession.

GEORGE the second, &c. To the sheriff
of greeting. Whereas lately in *If by original,*
our court before us at *Westminster*, by bill, with- *say, by our*
out our writ, and by the judgment of the same *writ.*
court, recovered against his term yet to
some of and in one messuage, &c. with the appur-
tenances, situate, lying and being in your
county, which on the day of
in the year of our reign demised to the
said for a term of years not yet expired,
to wit, from the day of then last
past to the full end and term of five years thence
next ensuing and fully to be compleat and ended;
by virtue of which demise the same
entered upon the same tenements with the ap-
purtenances, and was thereof possessed, until the
said afterwards, to wit, on the same
day of in the year aforesaid, with
force and arms entered into the said tenements

with the appurtenances, and him the said from his farm aforesaid, the said term then and there not being expired, ejected, drove out and removed, and him the said hath withheld from his possession thereof, and still doth withhold, whereof the said is convicted, as appears to us of record; therefore we command you, that without delay you cause the said to have his possession of his term aforesaid yet to come of and in the tenements aforesaid with the appurtenances, and in what manner you shall have executed this our writ do you make appear to us at *Westminster* on, &c. and have you there this writ. Witness, &c.

If by original, observe to make it returnable on a general return, &c.

Error.

Judgment against two, one cannot bring error alone.

BY the *stat. 27 Eliz.* upon any judgment given in this court in debt, detinue, covenant, account, action upon the case, *ejectione firmæ* or trespass, first commenced there, (where the king is not a party) a writ of error may be brought in the exchequer chamber (a), and the judgment either *reversed* or *affirmed*.

(a) Where a writ of error determines, in the exchequer chamber, by abatement or discontinuance, the judgment is not again in *B. R.* till there be a *remittitur* entered, for without such *remittitur* it cannot appear to the court of king's bench, but that the writ of error is still depending *in camera saccharii*.

But not for error concerning the jurisdiction of the king's bench or want of form in any writ return, plaint, bill, declaration or other proceedings.

And after *reversal* or affirmance the record shall be remanded, that the court of king's bench may proceed thereupon.

Note

Note; Before this stat. an erroneous judgment given in this court was reverfable only in parliament.

After a judgment given in *B. R.* is reverfed or affirmed in the exchequer chamber, error lies in parliament.

Error lies not in the exchequer chamber upon a judgment upon a *scire facias* but only in *B. R.* because it is *casus omiffus* out of faid statute, which gave writs of error returnable in the exchequer chamber upon judgment recovered in the king's bench by *bill*.

Writs of error on judgment given in *C. P.* or inferior courts, are returnable in *B. R.*

If judgment in the *C. P.* be for the plaintiff, and the defendant brings error, there fhall only be judgment to reverse the former judgment, for the fuit is only to be eafed of that judgment.

But where the plaintiff brings error, the judgment fhall not only be a reversal, but the court fhall give fuch judgment as the court below fhould have done, for the writ of error is to revive the firft caufe of action, and to recover what he ought to have recovered by the firft fuit, wherein an erroneous judgment was given. *Salk.* 262.

Where the fuit in this court is by *original*, error muft be brought in parliament (*a*) only, (*a*) So upon for the fuit is not firft commenced in *B. R.* but an action *qui* in chancery; and if a writ of error be fued out, *tam*, where it is merely void, and no *superfedeas* of execution, the king is to have a part.

Bail cannot have a writ of error in the exchequer chamber, by *stat.* 27 *Eliz. c. 8.* *Vide Cro. Car.* 300.

Writ of error within what time to be brought.]

No fine, common recovery or judgment, in any real or personal action, shall be reversed for error, unless the writ of error be brought and prosecuted with effect within 20 years. *Stat. 10 & 11 W. 3. c. 14.*

How to sue out a writ of error.] Make a *præcipe* according to the nature of the case.

Præcipe.

Middlesex. **W**RIT of error for *A. B.* at the suit of *C. D.* on a judgment in case given in the court of king's bench by bill.

Dated, &c.

Ret.

Carry the *præcipe* to the curfitor of the county, wherein the action is laid, and he will make out a writ of error.

Writs of error returnable in the exchequer chamber to be immediately delivered to the clerk of the errors, and no one shall be hindered from

Of allowing writ of error.] When you have got the writ from the curfitor, you carry it to the clerk of the errors of that court in which the judgment was given, to be allowed by him; pay him and he will give you a notice in writing, (a copy of which must immediately be delivered to the attorney on the other side) signifying the allowance of the writ of error.

suing out execution, until the writ shall be delivered to the clerk of the errors. *Rule, E. 26 Car. 2. (a)* Same practice where the judgment is given in the *C. P.* and removed by writ of error into this court; only the clerk of the errors in *C. P.* is to allow the writ, give rules for putting in bail, &c. instead of the clerk of the errors of this court.

From what time a writ of error is a supersedeas.] A writ of error is a *supersedeas* from the time of the allowance, and that is notice of itself; but if the defendant in error have notice before the allowance, it is from the time of that notice a *supersedeas*.

But though the allowance is notice of itself, so as to supersede the execution, yet to bring the attorney into contempt, he must have had notice.

A writ of error is in judgment of law a *supersedeas*, until the errors are *examined, affirmed or reversed*. Sec Vent. 255.

If a writ of execution be executed before a writ of error allowed or notice, it may be returned afterwards. The utmost length of time the law allows for executing is the day whereon the writ is returnable, and it is not executable any longer that day, than while the court sits; so long as it is *executable, but not executed*, the allowance of a writ of error is a *supersedeas*, but not afterwards. *Salk. 321.* A new writ of error where the first abated by the act of the plaintiff in error, is no *supersedeas*.

Bail in error.

Within what time to be put in.] In all cases where special bail is required, unless the plaintiff do within 4 days after the delivery of the writ of error to the clerk of the errors put in bail, according to law, the defendant in error may proceed to execution, notwithstanding such writ. *Rule, E. 16 Car. 2.*

Of notice of putting in bail.] Notice to be given without delay of bail being put in on any writ of error to the defendant or his attorney.

Excepting.] Bail if not excepted against in 20 days next after such notice, such bail to be allowed. *Rule, 5 W. & M.* and exception to be entered with the clerk of the errors, and not given to the plaintiff in error.

Justifying, &c.] After a rule for better bail from the clerk of the errors, if the bail do not justify, or better bail be put in within *four* days after notice of the rule, the plaintiff in the action may sue out execution, but the writ of error remains still, and the plaintiff in error may proceed thereupon. It is only the *superfedeas* to the execution, that is taken away.

The condition of a bond was, that if the defendant furnished a third person's cellar with beer, the defendant would pay not exceeding 100*l.*

In what cases bail must be put in on a writ of error.] Execution shall not be staid upon any writ of error for reversing any judgment in any action or bill of debt, upon any single bond for debt, or upon any obligation with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contract, unless the person suing such writ of error shall with two sufficient sureties, such as the court pleaded, that none was delivered; to which plaintiff replied a delivery to the value of 80*l.* and the defendant demurred, and judgment for the plaintiff. Error was brought, and bail not being put in, execution was taken out; and now upon consideration of 3 *Jac.* 1. c. 8. where the words are, *bonds for the payment of money only*, *Cur.* set aside the execution; for this is by no means a certain demand, but rests upon a *quantum meruit*, and the sum is only put into the replication, in order to assign a breach. And the *ass* being so restrain on a legal remedy, must be taken strictly. (Cites 1 *Keb.* 613. *Carth.* 28. 2 *Bulst.* 54. 1 *Lev.* 117.) T. 16 G. 2. *Thrall v. Vaughan*, Str. 1190. shall

shall allow of, be bound by recognizance in double the sum recovered, to prosecute the writ of error with effect, and pay, if judgment be affirmed, all debts, damages and costs adjudged on the former judgment, and all costs and damages to be awarded for delaying execution. Stat. 3 Jac. 1. c. 8.

And by stat. 13 Car. 2. c. 2. s. 9. no execution shall be staid by writ of error, after verdict and judgment thereon, in any action of debt upon 2 Ed. 6. for not setting out of tithes, action upon the case upon promise for payment of money, action *sur trover*, covenant, detinue and trespass, unless such recognizance as by stat. 3 Jac. be first acknowledged.

And by stat. 16 & 17 Car. 2. c. 8. s. 3. no execution shall be stayed by writ of error after verdict and judgment in any *personal* action, unless such recognizance be first acknowledged.

Nor upon any judgment after verdict in *dower* or *ejectment*, unless the plaintiff in error shall become bound, &c. But writs of error brought by executors or administrators, popular actions, action on penal laws, (except in 2 Ed. 6.) indictments, presentments, informations and appeals, are excepted.——Note; The two last acts relate only to writs brought on judgment after verdict.

On a verdict in *ejectment* the plaintiff in error's own recognizance is sufficient without any further surety (a). But the recognizance ought

to be in double the value of one year's rent, and he ought to be examined if he be worth so much.——In *dower* plaintiff in error's own recognizance sufficient. (a) But the plaintiff may find bail, and need not be bound himself.

If an action of debt be brought upon a bond to perform covenants, and there is judgment by default, without craving *oyer* of the condition in this case upon a writ of error brought, the plaintiff in error must put in bail, because it doth

doth not appear to the court upon the record, that the condition was for performance of covenants.

On a bottomree bond there must be bail. Plaintiff recovered on a bottomree bond, and the defendant brought a writ of error, but put in no bail; and the question was on the words of the statute, *bonds for payment of money only.* *Et per Cur:* The contingency having happened, this is now in every respect *a bond for the payment of money only*, and therefore there must be bail. *M. 8 Geo. 1. Pit v. Coney, Str. 476.*

If judgment be against an executor or administrator *de bonis propriis*, and he brings a writ of error, he must put in bail in such cases, as required by the above statutes, and pay costs, if judgment be affirmed; but if the judgment be *de bonis testatoris* only, he shall neither put in bail nor pay costs.

Cases wherein bail is not required.] No bail on writs of error from inferior courts, they being omitted out of the above statutes.

No bail on a writ of error upon a judgment in an action of debt upon *bond conditioned for performance of covenants*, or upon a *bail-bond*, for where bail is required on error upon a judgment in an action of debt upon a bond, the *bond must be for payment of money only.*

Though an executor by 16 & 17 Car. 2. c. 8. is not obliged to give bail on error, yet if an executor will submit to do as other defendants do, the court may take it, and it will bind the parties. *Hil. 13 Geo. 1. Laserre v. Johnson. Idem v. Emily, Str. 741.*

No bail in error of an outlawry till reversal.
Pending error to reverse an outlawry on *mesne* process

process, the defendant in error moved to *quash* the writ, because no bail was given. *Sed per Cur'*: That is never done till the outlawry is reversed, and then we take bail to appear to an original, to be brought within two terms; and so it was done in this case. *T. 6 Geo. 2. Duckett v. Martin, Str. 951.*

New bail.] Judgment in the common pleas, error in *B. R.* and judgment affirmed; if a writ of error be brought in parliament, new bail is required, for the first recognizance does not include payment of costs to be assessed in the house of lords. *Vide Salk. 97.*

A release of errors was pleaded, and the defendant in error made the record with a prayer, that the judgment be affirmed; but the court said, they were not bound by that prayer, and directed the entry to be, that the plaintiff be debarred of his writ of error. *T. 13 G. 1. Downes v. Hemeline, MS. Rep.*

A *capias ad satisfaciendum* was taken out against bail on a writ of error, and the court refused to set it aside: though *1 Roll. Abr. 898.* is, that it will not lie. *Hil. 2 G. 2. Goodchild v. Chaworth, Str. 822.*

Surrender, &c.] Bail cannot surrender in error, the condition of the recognizance being, *that the plaintiff in error shall prosecute his writ of error with effect; and if judgment be affirmed, shall satisfy the debt, damages and costs recovered, together with such costs as shall be awarded by occasion of the delay of execution, or else that they (the bail) shall do it for him.*

Rule

B. R. does not send the record to the exchequer chamber. After error in the exchequer chamber *Rule to transcribe the record.]* On allowance of a writ of error, and putting in bail (where it is required) defendant in error may have a rule from the clerk of the errors for plaintiff to certify or transcribe the record, which if he does not in time, a *nolle prosequi* may be entred.

the transcript was brought back and amended in *B. R.* by the original record. And it was held necessary to make the amendment here, as this differs from the case of a writ of error from *C. B.* because the common pleas sends up the very record, and the king's bench sends only a transcript. *3 G. 2. Rutter v. Redstone, Str. 837.*

Of the time taken by the clerk of the errors to transcribe.] If error brought on a judgment in *C. P.* be returnable the first return of a term, clerk of the errors takes the whole term to transcribe the record, and brings in the transcript the last day of that term.

If the writ be returnable on any other return, he takes the whole vacation to transcribe, and brings in the transcript on the first day of the next term.

If plaintiff in error does not enter the transcript on record the same term it is brought into the office, defendant may.

And the party who first takes the transcript out of the office, to keep it no longer than while a copy is made, and then bring it back, that the other side may make a copy thereof.

Scire facias quare executionem non.] On error returnable in this court, as soon as the transcript is brought into the office of the chief clerk, and entered in the book, defendant in error may make out a *scire facias quare, &c.*

Return,

Return, &c.] On error from an inferior court, where the proceedings were by *bill*, the return of the *scire facias quare, &c.* and all subsequent proceedings, must be on a day certain.

Where by original on a general return.] Error on a judgment given in the palace court, the *scire facias, &c.* must be returnable on a general return, the writs in that court being returnable on their court-days, and not on such return-days as in the court of king's bench.

Teste scire facias, &c.] If the transcript be brought into the office before the effoin-day of any term, the *scire facias* may bear teste the last day of the preceding term.

If brought in within the term, it may bear teste the first day of that term.

Note; Plaintiff in error can have no *oyer* of this writ, or plead any thing thereto, but an assignment of error.

On return of scire facias, &c. rule for judgment.] On a *scire feci* returned, or *nichils* on two *scire facias*, defendant in error may give a rule for judgment, which will be out in four days, and he is not obliged to give notice of it, or to call for an assignment of errors.

How to enter scire facias, &c. no errors being assigned, and proceed against plaintiff or bail.] If the rule for judgment on the *scire facias* be out, and plaintiff has not assigned errors, defendant must enter the *scire facias*, if one, and a *scire feci*, of that term in which the *scire facias* was returnable. And if two, and *nichil* of that term

term in which the first *scire facias* was returnable, with an award of the second, and of execution, and may thereupon sue out any execution against the plaintiff in error, his body or goods, or on a *non est inventus* returned, may sue out a *scire facias* against the bail.

On a judgment on the *scire facias* defendant in error is not intitled to costs; and therefore if he would have costs, he must nonpross the writ of error.

[Of nonprossing writ of error.] Get a rule from the secondary for plaintiff in error to assign errors *de recordo*; serve plaintiff's attorney in error with a copy thereof, and then, if plaintiff does not assign errors within the time given by the rule, defendant in error may sign a nonpross, and have costs, according to the *stat. 3 H. 7. c. 10.*

Where matter of law and fact is assigned for error, 'tis double, and the plaintiff may have advantage of it upon a demurrer, but not after *in nullo est erratum* pleaded.

[Of assigning errors and pleading, &c.] On the rule to assign errors *de recordo*, if the plaintiff assign errors, as he may, notwithstanding execution on the judgment on the *scire facias* has been really executed, and the judgment be reversed, he shall have restitution.

Assignment of errors must be signed by counsel, and a copy delivered to defendant's attorney in error.

If the errors assigned be general, the defendant in error may immediately plead *in nullo est erratum*, which joins the issue.

After *in nullo*, &c. plaintiff in error is never permitted to amend general errors.

An ejectment was brought against the company and Mr. *Edwards*; after a verdict for the plaintiff Mr. *Edwards* died, and a writ of error is brought, laying the judgment to be *ad grave damnum*

Amnum of the company and of *Mary Edwards*, the daughter and heir, and she and the company jointly assign errors. Motion to amend the writ and assignment by striking out her name; and upon consideration the court were of opinion, that it was amendable by the statute 5 G. 1. c. 13. not only as a *variance* from the original record, which is really no way to the damage of *Mary Edwards*, but also by virtue of the general words *other defect*. Hil. 4 G. 2. *The sword-blade company v. Dempsey*, Str. 892.

Diminution.] After *in nullo est erratum* pleaded, neither defendant or plaintiff in error can alledge diminution without leave of the court.

But *Cur.* may order a *certiorari ad informandum conscientiam curie*, and that to affirm, but not to reverse a judgment.

No diminution in records out of inferior courts can be alledged.

Certiorari.] If plaintiff in error prays a *certiorari*, defendant in error may enter a rule to return the *certiorari*, and serve plaintiff's attorney therewith.

If the *certiorari* be not returned and filed by the time given by the rule, defendant may join in error by pleading *in nullo est erratum*, and enter a *non misit breve* on record, taking no notice of the diminution.

When a *certiorari* is returned and filed, defendant may join *in nullo est erratum*.

Where want of an original is assigned for error, the plaintiff in error does not sue out a *certiorari*, but the practice is for the defendant in error to get a rule from the secondary for the plaintiff in error to return his *certiorari*, which
if

if he does not, the assignment of errors signifies nothing. *Salk.* 267.

If a record below be of *Easter* term, and want of an original be assigned for error, the defendant may alledge *diminution*, and then a *certiorari* goes to the *custos brevium* to certify an original of *Easter* term, that being the term of which the *placita* is.

If the *custos brevium* certifies a *variant* original, or that there is *no original*, defendant in error may come and suggest, before *in nullo est erratum* pleaded, that there is an original of another term, *viz.* *Hilary* or *Michaelmas*, and then a *certiorari* issues to the *custos brevium* to certify that, and another to the chief justice of the common pleas to certify the continuances.

If the *custos brevium* certify a *wrong original* of the same term the *placita* is of, the defendant in error may (as it has been held) suggest there is a *right original*, even of that very term, and when both are before the court, they will apply the record to that which is a good original.

Issue, concilium.] When *certiorari* is returned and filed, and defendant in error has joined issue by pleading *in nullo est erratum*, either side may move for a *concilium*, and set down the cause for argument with the clerk of the papers.

Paper books.] To be delivered to the judges at least two days before the argument; but by *Rule E. 2 Jac. 2.* the paper books are directed to be delivered *four* days before.

Plaintiff in error delivers books to the chief justice and the first puisne judge, and defendant in error books to the other judges. *Rule, M. 17 Car. 1.*

The court will not hear the argument, unless the books be delivered to the judges; *Ergo*, the attorney, who expects the judgment of the court will be for his client, should deliver all the books, especially as he will be allowed in costs for those copies he makes for the other side. See *same Rule*.

On error in the exchequer chamber.] Plaintiff's attorney in error, if he designs to argue the same, must give 10 days notice thereof to the clerk of the errors in the exchequer chamber, and shall deliver 4 books to the judges of the common pleas, and defendant's attorney four books to the barons of the exchequer, *four* days before the argument. *Rule, E. 33 Car. 2.*

Scire facias ad audiendum errores.] A *scire facias ad audiendum errores* is not well brought before the record of the judgment be certified to reverse which the writ of error was brought, and errors assigned thereupon, for there is no record in court to warrant the granting the *scire facias* before the record of the judgment is certified, and errors assigned. Note; The exchequer chamber does not award a *scire facias ad audiendum errores*, but notice must be given to the parties concerned.

If defendant in error does not appear on the *scire facias* to hear errors, you set down the cause, and the plaintiff in error shall be heard *ex parte*. *Vent. 34.*

Abatement of writ of error, &c.] A writ of error abates by the death of the plaintiff (a) in error, but not by the death of the defendant, either *before* or *after* assignment of errors. (a) Judgment in common pleas against 4 in trespass,

who bring error in *B. R.* After the record certified, one of the plaintiffs in error dies, the writ is abated, and the plaintiffs in the original action may have execution on suggesting the death of the party upon record, but need not sue out a *scire facias*. *Vide Salk. 219.*

But it is said, that if the plaintiff in error dies *before* errors are assigned, the writ abates, and the defendant may proceed to revive the judgment by *scire facias* against his executor. But if plaintiff in error dies *after* assignment of errors, and issue taken thereon, defendant in error may proceed to get the judgment affirmed, but then it must be revived against plaintiff in error.

In case of a defendant's death, plaintiff in error must, before he can proceed to a reversal, sue out a *scire facias* to hear errors against his executors.

But if the writ of errors was brought merely for delay, the plaintiff will not be in such a hurry, and therefore the executor should sue out a *scire facias quare executionem non*, and upon that plaintiff will be obliged to assign errors, if they were not before assigned.

But if they were assigned before the defendant's death, the executor proceeds (as if the defendant was living) till the judgment be affirmed, and then he must revive by *scire facias*.

Otherwise
where it
abates by the
act of God.
See 1 Vent.
353.

Where a writ of error abates by the act of the plaintiff in error, and he sues out a new writ, that writ is no *supersedeas*, and defendant in error may have execution.

Remittitur, where necessary.] Where a writ of error determines in the exchequer chamber by *abatement* or *discontinuance*, judgment is not again in *B. R.* without a *remittitur*.

Amendments, &c.) By *stat. 5 G. 1. c. 13.* all variances and defects, which vary the writ of error from the record, are amendable, and no costs are to be paid on such amendments.

Error

Error coram nobis residen'. (a)

(a) Note;
Error co-
ram nobis re-
siden' lies not

THIS writ of error is allowed in court by the secondary (b), and is no *superfedeas*, (as it is said) but by the leave of the court, in regard none of the statutes which oblige the plaintiffs in error to put in bail, extend to this writ of error. *Sed Q.* if it is not a good *superfedeas* from the allowance even *without* notice?

in the ex-
chequer
chamber.
(b) *Q.* if it
may not be
allowed in the
vacation?

In order to compel the plaintiff to assign errors, you must move the court, and he must assign errors immediately upon service of the rule.

The errors are to be assigned and entered upon the record of the judgment.

The errors to be assigned must be *facts* only, for error in fact is not the error of the judges, and therefore the reversing of a judgment given by them, erroneous in matter of fact only, is not the reversing their judgment; but otherwise if the judgment be erroneous in matter of law, for they cannot be said to reverse their own judgments.

Upon issue taken of error in fact, you may proceed to trial *per pais*, as in other common cases, and if found for the plaintiff on trial, he must move to put the cause in the paper for argument, and then upon producing the *postea* the court will give judgment of reversal.

Defendant on
error in fact
assigned, may
carry the cause
to trial the first
assizes *without*
proviso.

In error *cor. vob.* there is no *scire facias* to assign error, but the defendant in error must move the court for a rule against the plaintiff in error to assign his errors, which must be in some matter of fact, as non-age, death, &c. E. 13

G. 1. *King v. Jones*, MS. Rep.

E e 2

Error

(a) Suing the bail below pending a writ of error in parliament, is a contempt and breach of privilege.

1 Will. Rep. 685.

(b) Error lies not from the court of exchequer to the house of lords, for the exchequer chamber interposes. *Salk.* 512.

Error returnable in parliament (a).

Of suing out a writ of error returnable in parliament (b)]. Get the curfitor to procure a warrant from the king, for which you pay 5*l.*

Of the return of such writ.] A writ of error that is brought in parliament, is made returnable immediately, or upon a prorogation *ad proximum parliamentum*, because that court during the session of it sits continually, and has no vacation.

Allowance.] You pay for allowance of this writ with the clerk of the errors 4*l.*

Return by the chief justice.] The lord chief justice of the king's bench carries the record and a transcript thereof up to the house of lords, and after they are examined there, he leaves the transcript with the lords, but brings the record back again.

Assigning errors.] The proceedings in this high and honourable court are very expeditious, there being no *scire facias* but upon a motion made in the house by one of the peers on defendant's behalf; a day is appointed for the plaintiff in error to assign his errors.

If you are for the plaintiff in error, get a peer to move that, upon your assigning errors, the defendant may appear and make his defence.

Issue and hearing errors.] After issue is joined on *in nullo est erratum*, upon a motion made by one of the peers, the lords appoint a day for the hearing of the errors, at which day both parties

parties must attend with their counsel, usually two on each side; but neither party must have more than two counsels after hearing, and the lords having either affirmed or reversed the judgment, the clerk of the parliament remands the transcript of the record into the king's bench with the affirmance or reversal thereof, to be entered there upon record.

N O T E S.

1. If error be brought on a judgment of the court of common pleas, returnable in *Banco Regis*, and bail put in, if the judgment be affirmed, and error brought in parliament, there must be a new recognizance. *Salk.* 97.

2. The plaintiff obtained judgment in *B. R.* of which error was brought in the exchequer chamber, and bail put in, after affirmance there error was brought returnable in parliament, and upon consideration *Cur.* held, that there must be fresh bail. *T. 8 G. 1. Colebroke v. Diggs, Str.* 527.

3. Action in *B. R.* by original, judgment for defendant, and error brought in parliament, if the parliament reverse the judgment, they will give the same judgment as the court of king's bench ought to have done.

4. In matters of weight and difficulty the lords examine the errors with the advice and counsel of the judges, who inform them what the law is in such cases, and if judgment be reversed, then commandment is given for the lord chancellor to do execution accordingly; but if the judgment be affirmed, the court of king's bench is to proceed to execution, &c. *Instr. Cl. Part 1.* p. 301.

Writ of error tam in redditione judicii quam in adjudicatione executionis.

Who may have this writ.] Bail may bring a writ of error *tam in redditione judicii quam in adjudicatione executionis*, upon a judgment recovered against them by *scire facias*.

But bail cannot join the principal with himself in a writ of error. Error brought by bail on a judgment against him by *scire facias* in an inferior court; it was *tam in redditione judicii* against the principal, *quam in adjudicatione* against the bail; but was quashed against the principal, and the bail proceeded in order to reverse the judgment against himself.

Where this writ lies not.] On a judgment for plaintiff in the court of king's bench, afterwards affirmed in the exchequer chamber, and an award of execution in *B. R.* on a *scire facias* brought by plaintiff: The defendant cannot have a writ of error in the exchequer chamber *tam in red-*

(a) Otherwise if there had been no writ of error before on the original judgment. *Ibid.*

ditione judicii quam in adjudicatione executionis (a), for the merits of the first judgment have been examined, and such second writ is no *superseas* to the execution, and an execution sued out will be no contempt. *Salk. 263.*

Error from Ireland (b).

(b) When the transcript is brought over, it is lodged with Mr.

How to compel plaintiff in error to assign errors.] On motion *Cur.* will order plaintiff to

Heberdine, from whom plaintiff and defendant in error have copies. And if plaintiff in error does not bring in the transcript, then on a certificate from Mr. *Heberdine*, the curfitor will make out a writ *de executione judicii* directed to the chief justice in Ireland. The house of lords in Ireland have no jurisdiction to affirm, or reverse any judgment or decree made there. *Stat. 6 Geo. 1. c. 5. s. 2.*

assign errors within a week after service of the rule.

Service of the rule to assign, &c.] If the plaintiff in error, his attorney or agent, cannot be found, *Cur.* (or motion and affidavit) will order, that sticking up the rule in the publick office shall be good service on the plaintiff in error.

Joining in error.] Plaintiff in error must move the court for a rule for defendant in error to join in errors, and defendant has four days to join in errors after service of the rule.

Assignment of errors.] On an assignment of errors from *Ireland*, there must be an affidavit annexed verifying the same.

Note; You must have a rule of court to assign error, for no *scire facias* to hear error lies.

If judgment affirmed, &c.] If the judgment is affirmed here, the record is afterwards transmitted to *Ireland*, in order for the court there to award execution.

Amending writ of error.] The writ of error was returnable before any judgment given, and on consideration it was held to be such a fault, as is not amendable by the statute 5 G. 1. c. 13. §. 2 G. 2. *Wright v. Carning, Str.* 807.

Error of a judgment in *B. R.* in *Ireland* on a writ of error there, brought to reverse a common recovery, the fault in the writ of error was amended without costs, the statute not giving costs on amending, as it does on *quashing*. *Str.* 863.

There was a variance between the writ of error and record; as it stood in the paper, the court observed it, but neither party would move to

The present Practice of the

amend it, for fear of paying costs; upon which the court said, the *stat. 5 G. 1. c. 13.* would warrant their amending it, which they did without costs. *E. 4 G. 13. Gardner v. Merrett, Str. 902.*

If a writ of error be quashed for any other fault than variance, error *cor' vobis* lies. *Str. 607.*

[*Of quashing writ of error.*] *Cur.* will not quash a writ of error, though there appeared to be 29 years between the judgment and the bringing the writ, though he is restrained to 20 years, for *per Cur.* this will be to deprive him of the benefit of replying to the exceptions in the *Stat. 7. 3 G. 2. Higgs v. Evans, Str. 837.*

Scire facias quare executionem non in debt on a judgment removed out of the court of common pleas by writ of error.

GEORGE the second, &c. To the sheriff of *Middlesex*, greeting. Whereas *A. B.* lately in our court before Sir *J. W.* knt. Sir &c. [here name the rest of the justices] our justices of the bench at *Westminster*, by our writ, and by the judgment of the same court, recovered against *C. D.* of the parish of _____ in the county of *Middlesex*, gent. _____ pounds for debt, and sixty shillings for his damages, which he had sustained as well by occasion of the detaining of that debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *C.* was convicted, as by the inspection of the record and proceedings thereon, which we lately caused to come in our court before us for certain causes concerning error, appears to us from record; And now on behalf of the said *A.* in our said court before us, we have been informed, that although the said judgment

judgment be given in form aforesaid, yet execution for the said debt and damages still remains to be made to him; whereupon the said *A.* hath prayed us, that a proper remedy may be provided for him in this case; and we being willing, that what is just should be done on this occasion, command you, that by good and lawful men of your bailiwick you make known to the said *C.* that he be before us from the day of wheresoever we shall then be in *England*, to shew if any thing he has or knows to say for himself, why the said *A.* ought not have his execution against him for the said debt and damages, according to the force, form and effect of the said recovery, if he shall think it expedient, &c. and further to do and receive what our said court before us shall then and there consider of him in this behalf; and have you there the names of those by whom you shall make known to him, and this writ. Witness, &c.

The like on a judgment in an inferior court.

GEORGE the second, and so forth, To the mayor and bailiffs of the town of *Northampton*, greeting. Whereas *A. B.* lately in our court of the town aforesaid, before you without our writ, and by the judgment of the same court recovered against *C. D.* esq; pounds, for his damages which he sustained as well by occasion of the not performing of certain promises and undertakings lately made to the said *A.* by the said *C.* as for his costs and charges by him about his suit in that behalf expended, whereof the said *C.* was convicted, as by inspection of the record and proceedings thereupon,

upon, which we have lately caused to come in our court before us for certain causes concerning error, appears to us of record; and now on the behalf of the said *A. B.* in our said court before us we have been informed, that although the said judgment was given in form aforesaid, yet execution for the said damages still remains to be made to him, whereupon the said *A. B.* hath humbly intreated us for a proper remedy to be provided for him in this behalf; and we being willing, that what is just should be done in this behalf, command you, that by good and lawful men of the bailiwick of the town aforesaid, you make known to the said *C. D.* that he be before us from the day of wheresoever, and so forth; to shew if any thing he has or knows to say for himself why the said *A. B.* ought not to have his execution against him for the said damages, according to the force, form and effect of the said recovery, if he shall think it expedient, and so forth; and further to do and receive what our said court before us shall then and there consider of him in this behalf; and that you have there the names of those by whom you shall make known to him, and this writ. Witness, &c.

*Nonpross after two scire faciās's in error
on ejectment.*

AND afterwards, to wit, on *Wednesday* next after three weeks from the day of the *Holy Trinity* in this same term, before our lord the king at *Westminster* the said *C. D.* comes in his proper person, and says, that execution of the said judgment still remains to be made to
him,

him, therefore he prays the writ of our lord the king to be directed to the sheriff of the said county of to warn the said G. to be before our lord the king wheresoever, and so forth, to shew if any thing she has or knows to say for herself why the said C. ought not to have his execution thereof against her, as well of the possession of the said term yet to come of and in the said tenements, with the appurtenances, as of his damages, costs and charges, according to the force, form and effect of the said recovery; and it is granted to him, and so forth. By which *First scire* it is commanded to the sheriff of that by *facias*.

good and lawful men of his bailiwick he make known to the said G. that she be before our lord the king from the day of wheresoever, and so forth, to shew in form aforesaid, if, and so forth; and further, and so forth. The same day is given to the said C. and so forth. At which day before our lord the king at *Westminster* the said C. comes in his proper person; and the sheriff of the said county of to wit, *A. B.* esq; return, that the said *Ret. nihil.*

G. has nothing in his bailiwick, by which he can make known to her, nor is she found in the same, and she does not come; therefore, as before it is *Alias scire* commanded to the sheriff of that by good *facias*.

and lawful men of his bailiwick he make known to the said G. that she be before our lord the king on the wheresoever, and so forth, to shew in form aforesaid, if, and so forth; and further, and so forth. The same day is given to the said C. and so forth. At which day before our lord the king at *Westminster* the said C. comes in his proper person, and the sheriff of the said county of to wit, the said *A. B.* esq; likewise returns, that the said G. has nothing *Nihil ret.*
in

in his bailiwick, by which he can make known to her, nor is she found in the same; and the said G. although on the fourth day of the plea solemnly required, came not, but made default; and upon this the said C. says, that the said G. hath not yet assigned error or errors in the said

Day given to
assign errors.

Plaintiff in
error makes
default.

Costs.

record and proceedings. Therefore a day is given to the said parties before our lord the king at *Westminster* until *Wednesday* next after, &c. to wit, to the said G. to assign error or errors in the said record and proceedings, and so forth. At which day before our lord the king at *Westminster* the said C. comes in his proper person; and the said G. at that day solemnly demanded came not, but likewise made default, nor has she further prosecuted the said writ of error against the said C. It is therefore considered, that the said G. be in mercy, and that the said C. have therefore his execution against the said G. as well of the possession of the said term yet to come of and in the said tenements with the appurtenances, as of his said damages, costs and charges, according to the force, form and effect of the said recovery, and so forth. And it is further considered, that the said C. recover against the said G. pounds adjudged to the said C. by the court of our lord the king now here, according to the form of the statute, and so forth; for his damages, costs and charges, which he sustained by occasion of the delaying the execution of the said judgment by pretence of prosecuting the said writ of error; and that the said C. likewise have thereupon execution, and so forth.

Error

Error assigned in parliament.

Afterwards, to wit, on the day of
 in the year of the reign of
 our sovereign lord *George* the second, now king
 of *Great Britain*, and so forth, before the king
 himself in his parliament, the said *C. D.* comes
 by his attorney, and says, that in the
 said record and process, as also in giving the said
 judgment, there is manifest error, in this, to wit,
 that the said declaration and the matter contained
 therein, are not sufficient in law to maintain the
 action of the said *A. B.* against the said *C. D.*
 therefore in that there is manifest error; also in
 this, that by the said record it appears, that the
 said judgment in form aforesaid was given for
 the said *A. B.* against the said *C. D.* where by
 the law of the land the said judgment ought to
 have been given for the said *C. D.* against the
 said *A. B.* and the said *C. D.* prays, and so forth.

Another.

Afterwards, to wit, on the day of
 in the year of the reign of
 our sovereign lord *George* the second, now king
 of *Great Britain*, and so forth, before our said
 lord the king and great men and peers assembled
 in this present parliament at *Westminster* in the
 county of *Middlesex*, the said *C. D.* comes by
 his attorney, and says, that there is
 manifest error in the said record and process,
 also in giving and affirming the said judgment
 mentioned in the said record, in this, to wit, that
 by

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by the said record it appears, that the said judgment, given by the said court of our lord the king before the king himself at *Westminster*, was given for the said *A. B.* against the said *C. D.* where by the law of the land the said judgment ought to have been given for the said *C. D.* against the said *A. B.* and therefore in that there is manifest error; there is also error in affirming the said judgment, because he says, that the said judgment was affirmed in the court of our lord the king of exchequer chamber at *Westminster* before the justices of the common bench and the barons of the said exchequer, where no such affirmation of the said judgment ought to have been thereupon given; but the said judgment by the law of the land ought to have been reversed, and therefore in that there is manifest error; and the said *C. D.* prays, that the said judgment, for the said errors and others in the said record and process, may be reversed, annulled and entirely set aside, and that he may be restored to all that he has lost by occasion of the said judgment and affirmation, and that the said *A. B.* may rejoin to the said errors, and so forth.

Error assigned on a judgment and affirmation of that judgment, in Ireland.

Afterwards, to wit, on next after
in this same term before our lord the king at *Westminster* the said *C. D.* and *E. F.* come by *R. S.* attorney, and say, that in the said record and process, and also in giving the said judgment, and also in affirming the same, there is a manifest error in this, to wit, that by the record of the said judgment and affirmation of the same it appears, that the said judgment in form aforesaid was given and affirmed

firm for the said *A. B.* against the said *C.* and *E.* where, by the law of the land of the said kingdom of *Ireland*, the said judgment ought to have been given for the said *C.* and *E.* against the said *A.* therefore in that there is manifest error; and this they the said *C.* and *E.* are ready to verify; wherefore they pray, that the said judgment and affirmance thereof, for the said error and other errors in the said record and process, may be reversed, annulled and entirely set aside, that the said *C.* and *E.* may be restored to all that they have lost by occasion of the said judgment and affirmance, and so forth; and that the said *A.* may rejoin to the said errors, and so forth.

Error assigned in B. R. on a judgment given in C. B.

Afterwards, to wit, on next after
the before our lord the king at
Westminster, the said *C. D.* comes by his
attorney, and says, that in the said record and
process, also in giving the said judgment, there
is manifest error, in this, to wit, that the said
declaration in the said record mentioned, and
upon which the said judgment is given in form
aforesaid, and the matter therein contained, is
not sufficient in law to maintain the said judgment
thereupon given in form aforesaid, and so
the said judgment thereupon given in form
aforesaid is erroneous and void in law, and therefore
in that there is manifest error; there is also
manifest error in this, that where by the said record
it appears, that the said judgment in form
aforesaid given was given for the aforesaid *A. B.*
against the said *C. D.* where by the law of
the land judgment in the said plea ought to have
been

been given for the said *C. D.* against the said *A. B.* and therefore in that there is manifest error; and he prays, that the said judgment, for these errors and others in the said record and process, may be reversed, annulled and intirely set aside, and that the said *A.* may be restored to all that he has lost by occasion of the said judgment, and that the said *A. B.* may rejoin to the said errors, and so forth; and the said *A. B.* comes by his attorney, and says, that there is no error either in the said record and process, or giving the said judgment, and prays, that the court of our lord the king now here may proceed to examine as well the said record and process, as the said matters above assigned for errors by the said *C. D.* and that the said judgment may be in all things affirmed.

Error assigned on judgment in C. B.

AND the said *C.* countess dowager of by her attorney, comes and says, that in the said record and process, as also in giving the said judgment, there is manifest error, in this, to wit, that the said declaration and the matter therein contained, are not sufficient in law to maintain the action of the said *E.* and *G.* thereupon against her the said countess, therefore in that there is manifest error; there is also error in this, that by the said record it appears, that the said judgment given in the manner and form aforesaid was given for the said *E.* and *G.* against the said countess in the plea aforesaid, where by the law of the land the said judgment ought to have been given for the said countess against the said *E.* and *G.* and therefore in that there is manifest error; and the said countess

tefs further ſays, that there is alſo error in this,
 to wit, that there is not any warrant of attorney
 affiled of record in the ſaid court of common
 bench between the ſaid parties of the plea aforeſaid,
 to warrant the ſaid to be attorney for the
 ſaid E. and G. againſt the ſaid counteſs in the
 plea aforeſaid; therefore in that alſo there is
 manifeſt error; wherefore the ſaid counteſs prays
 the writ of our lord the king of *certiorari* to the
 chief juſtice of our ſaid lord the king of the
 bench, to be directed, and ſo forth; and it is
 granted to her, and ſo forth; whereby it is
 commanded to *Wm. Lord Mansfield*, chief juſ-
 tice of the bench aforeſaid, that he ſearch the
 rolls and other memorandums of the warrants
 of attorney of the county of *Middleſex* of *Eaſter*
 term in the year of the reign of our ſaid
 lord the king, being in his cuſtody on record,
 and that he without delay certify to our ſaid
 lord the king whereſoever, and ſo forth, what
 he ſhall thereupon find in the ſaid rolls and me-
 morandums, together with the writ of our ſaid
 lord the king to him thereupon directed, and
 ſo forth; which ſaid chief juſtice of the bench
 aforeſaid answered to our ſaid lord the king,
 that the execution of the ſaid writ appeared in
 a certain ſchedule annexed to the ſaid writ, in
 which ſaid ſchedule is contained the title of the
 rolls of the warrants of attorney, filed of *Eaſter*
 term aforeſaid in the ſaid writ ſpecified, being in
 the cuſtody of the ſaid chief juſtice on record,
 and the record, of a certain warrant of attorney
 between the parties aforeſaid, of the plea afore-
 ſaid, in the ſame form in which the ſaid warrant
 of attorney is entered on record on the ſaid rolls;
 which ſaid title and warrant of attorney follow

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in these words, The rolls of attorneys received before *Wm. Lord Mansfield*, chief justice of our lord the king of the bench, and his companions, of *Easter* term in the year of the reign of our sovereign lord *George* the second, king of *Great Britain, France* and *Ireland*, defender of the faith, and so forth.

Middlesex, to wit, *E. F.* esq; and *G.* his wife, executrix of the last will and testament of Sir knt. put in their place their attorney, against *C.* countess dowager of *Plymouth*, executrix of the will and testament of *Charles*, earl of of a plea of debt, which said writ is affiled among the records without a day, and so forth; and upon this the said *E.* and *G.* by their attorney, come freely here into court, and the said *C.* countess dowager of as before says, that in the said record and process, as also in giving the judgment aforesaid, there is manifest error, by alledging the errors aforesaid by her in form aforesaid alledged, and prays, that the said judgment for those errors and others in the said record and process may be reversed, annulled and entirely set aside, and that she may be restored to all that she has lost by occasion of the said judgment, and so forth; and that the said *E.* and *G.* may rejoin to the said errors, and so forth; and that the court of our said lord the king here may proceed to the examination as well of the said record and process, as of the aforesaid matters above assigned for error, and so forth; and the said *E.* and *G.* say, that there is no error either in the said record and process, or in giving the said judgment; and they likewise pray, that the court of our said lord the king

king may proceed to the examination as well of the said record and process, as of the matters aforesaid above assigned for error, and that the said judgment may be in all things affirmed, and so forth; and because the court of our said lord the king now here is not yet advised what judgment to give thereupon, a day is given to the said parties, that they be before our lord the king from the day of *St. Michael* in three weeks then next ensuing, wheresoever, and so forth, to hear their judgment thereon, because the court of our said lord the king now here is not yet advised thereof; at which day before our lord the king at *Westminster* the said parties come by their attorneys aforesaid; but because the court of our said lord the king now here is not yet advised what judgment to give of and concerning the premisses, a day is given to the said parties, that they be before our lord the king on the octave of *St. Hilary*, wheresoever, and so forth; to hear their judgment thereon, because the court of our said lord the king now here is not yet advised thereof; at which day before our lord the king at *Westminster* the said parties come by their attorneys aforesaid; but because the court of our said lord the king now here is not yet advised what judgment to give of and concerning the premisses, a day is given to the said parties, that they be before our lord the king in fifteen days of *Easter*, wheresoever, and so forth, because the court of our said lord the king now here is not yet advised thereof; at which day before our lord the king at *Westminster* the said parties come by their attorneys aforesaid; upon which as well the said record, and process and judgment thereupon given, as the said causes and matters above for error assigned being viewed, and by the

Judgment reversed.

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court of our said lord the king now here fully understood and diligently examined, for that it appears to the court of our said lord the king now here, that there is manifest error in the said record and process, also in giving the said judgment; It is considered, that the said judgment for the said errors and others in the said record and process be reversed, annulled, and entirely set aside, and that the said C. countess dowager of be restored to all that she has lost by occasion of the said judgment, and so forth.

A record of nisi prius on issue joined in error.

Pleas before our lord the king at Westminster, of the term of the Holy Trinity in the year of the reign of our sovereign lord George the second, now king of Great Britain, and so forth.

Roll

England, OUR lord the king gave in charge to wit, **O** to his right trusty and well beloved Sir *John Willes*, knt. his chief justice of the bench, his writ close in these words, to wit, *George the second*, by the grace of God king of *Great Britain, France and Ireland*, defender of

The record of the faith, and so forth, To our right trusty and the judgment well beloved *Sr. John Willes*, knt. our chief after a verdict justice of the bench, greeting. Because in the in case. record and process, as also in giving judgment

of a plaint, which was in our court before you and your companions, our justices of the bench, by our writ between *A. B. C. D.* late of *London*, merchants, *G. H.* late of *London*, merchant, and *I. K.* late of *London*, merchant, of a certain trespass

trespass on the case to the said *A. B.* and so forth,
(to the end of the transcript) and the said *G. H.*
and *I. K.* in mercy, and so forth.

Afterwards, to wit, on *Wednesday* next, *Et c.* Errors
in that same term before our lord the king at assigned.
Westminster the said *G. H.* and *I. K.* come in
their proper persons, and say, That in the said
record and process, as also in giving the said
judgment, there is manifest error, in this, to wit,
that it appears by the said record, that the said
judgment is given as well against the said *C. D.*
as against the said *G. H.* and *I. K.* when in truth Death of one
the said *C. D.* in the said plea mentioned died be- of the defen-
fore the trial of the issue in the said record joined dants before
between the parties aforesaid; and before the trial.
giving the said judgment, to wit, on the
day of in the year of the reign
of our sovereign lord the now king at
aforesaid in the county of aforesaid,
and so the said judgment is erroneous and void
in law; and the said *G. H.* and *I. K.* pray, that
the said judgment for the error aforesaid, and
other errors in the said record and process may
be reversed, annulled, and entirely set aside, and
that they the said *G. H.* and *I. K.* may be restored
to all they have lost by occasion of the said
judgment; and they pray the writ of our said
lord the king to summon the said *A. B.* to come
before our lord the king to hear the said record *Scire facias*
and process, and it is granted to them; by to hear errors
which it is commanded to the sheriff of awarded.
that by good, and so forth, he make known to
the said *A. B.* that he be before our lord the
king on wheresoever, and so forth, to
hear the said record and process, if, and so
forth, and further, and so forth. The same day

Sheriff does not return the writ. is given to the said *G. H.* and *I. K.* and so forth; At which day before our lord the king at *Westminster* the said *G. H.* and *I. K.* come in their proper persons, and the sheriff did not return the said writ; and the said *A.* on the fourth day of the plea being solemnly required, also comes by

Plaintiff in original action appears, and pleads the defendant is living, and traverses his death. his attorney, and says, that by any thing before alledged the said judgment ought not to be reversed, because he says, that the said *C. D.* in the said plea mentioned, is yet in being and alive, without this, the said *C. D.* before the trial of the said issue in the said record joined between the parties aforesaid died, in the manner and form as the said *G. H.* and *I. K.* have above alledged; and this he is ready to verify; wherefore he prays, that the said judgment may be in all things affirmed, and so forth.

Replication.

And the said *G. H.* and *I. K.* as before say, that the said *C. D.* before the trial of the said issue in the said record joined between the parties aforesaid died, in manner and form as the said *G. H.* and *I. K.* have above alledged; and they pray, that this may be inquired of by the country; and the said *A. B.* does likewise the same, and so forth; It is therefore commanded to the sheriff of the said county of

Issue.

Award of venire.

that he cause to come before our lord the king from the day of the *Holy Trinity* in three weeks, wheresoever, and so forth, twelve, and so forth, of the body of the county, and so forth, by whom, and so forth, to take cognizance upon their oath, whether the said *C. D.* before the trial of the issue in the said record joined between the parties aforesaid died, as the said *G. H.* and *I. K.* have alledged or no, because as well, and so forth. The same day is given to the parties aforesaid, and so forth. At which day before

before our lord the king at *Westminster* came as well the said *G. H.* and *I. K.* in their proper persons, as the said *A. B.* by his attorney aforesaid, and the sheriff of to wit, esq; returns the said writ of *venire facias* to him in form aforesaid, Return of *venire.* said directed in all things served and executed, together with a panel of the names of the jurors of whom none, and so forth; It is therefore com- Award of *distringas.* manded to the said sheriff, that he distrain the said jurors by all their lands, and so forth, so that he may have their bodies before our lord the king from the day of *St. Michael* in three weeks, wheresoever, and so forth, or before the justices of our said lord the king, assigned to hold the assizes in the county aforesaid, if they shall first come, on the day of at in the county aforesaid, according to the form of the statute in such case made and provided, for default of the jurors, and so forth; therefore let the sheriff have the bodies, and so forth. The same day is given to the parties aforesaid, and so forth; And be it known, that *Le sciendum,* the king's writ in this case on record was delivered to the deputy sheriff of the same county on, &c. (the last day of the term) in this same term before the lord the king at *Westminster*, to be executed according to law at his peril, and so forth.

Wager of law.

In what case defendant may wage his law.] If an action of debt is brought upon simple contract between the parties without deed or record, in such case the defendant may wage his law by swearing in court in the presence of his compurgators, that he owes not the money in such manner

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and form as the plaintiff hath declared, nor any penny thereof.

Wager lies where the debt arises from a simple contract that is secret.

As in debt on an arbitrament where the submission is by parol, the defendant may wage his law, for the submission may be secret.

Wager lies in account, if the receipt was by the hands of the defendant, not if by the hands of a third person.

But in bailment, though by the hands of a third person, wager lies.

In debt for an amercement in a court baron, the defendant may wage his law.

In what case wager of law lies not.] On debt for the penalty of a by-law made by a corporation, defendant cannot wage his law.

Wager of law lies not in debt for subtraction of tithes.

Nor in debt on a *devastavit*.

Nor in debt for an escape.

In debt on a judgment in a court baron the defendant cannot wage his law, for the judgment could not but be by confession or verdict, and it was a proper court. *Salk.* 684.

In debt by a gaoler against his prisoner for meat and drink, defendant cannot wage, because the defendant is in *durance*, and the plaintiff cannot take security from him for repayment, for a bond will be void, and he must be content with a promise. *Salk.* 683, 4.

In debt for rent on a lease *parol*, defendant cannot wage his law, because his occupation is notorious, for wager lies not, where the action is founded on any thing that is notorious.

Lies not in account against a bailiff.

The method of waging law.] When the defendant wages his law, the secondary appoints a day for him to appear in court to wage his law; and if he appears, he must bring with him six compurgators, who are to swear, that they believe the defendant swears true.

The secondary must have the record in court, and the defendant must be set at the right corner of the bar, without the bar, and then the secondary will ask him, if he will wage his law. If he answers, he will, then the judges usually admonish him and also his compurgators, that they do not swear falsely. If he persist, the secondary proceeds as follows.

Secondary. A. B. (*the defendant*) You owe C. D. (*the plaintiff*) 50 pounds, (*or as the case is*) why do you not pay him?

Defendant. I owe him nothing.

Secondary. Did not you buy, &c. (*as in the declaration*)?

Defendant. No.

Secondary. Will you take your oath of it?

Defendant. I will.

If the plaintiff does not appear on being called thrice by the cryer, he becomes nonsuited, and the defendant goes quit without taking his oath. But if plaintiff appears, the cryer calls the plaintiff, and then defendant lays his right hand upon the book, and says after the secondary thus:

The

The oath.

HEAR, ye justices, that I owe not C. D. *(the plaintiff)* 50l. nor any penny thereof, in manner and form as he hath declared against me. So help me God, and the contents of this book.

Then his compurgators standing behind him are called over, and each holds up his right hand, and then lay their hands upon the book, and swear, that they believe, that what the defendant swore, was true.

Non suit.] If defendant wages his law *instanter*, the plaintiff is for ever barred; but if a day is given, plaintiff is demandable, and may be non-suited, and afterwards may bring a new action.

Declaration against a bailiff by the hands of the plaintiff.

Middlesex, **A.** B. complains of C. D. being in to wit. **A.** the custody of the marshal, &c. of a plea, that he render him reasonable account from the time he was bailiff of the said **A.** for that, to wit, that whereas the said C. D. was bailiff of the said **A.** at *Westminster* in the county aforesaid from the day of in the year of our lord until the day of the same month of and during that time had received of the goods, wares and merchandizes of the said **A.** by the hands of the said **A.** the proper goods, wares and merchandizes following,

lowing, to wit, [here set forth the goods]
to the value of pounds and
shillings of lawful money of *Great Britain*, to
merchandize and dispose of for the said *A.* and
to render the *A.* reasonable account thereof, when
he should be thereunto required; nevertheless
the said *C.* although often required, &c. has
not rendered the said *A.* reasonable account
thereof; but to render him the same hath alto-
gether refused, and still doth refuse; wherefore the
said *A.* saith he is the worse, and hath damage
to the value of pounds; and thereupon
he brings suit, &c.

Plea in bar, not his bailiff.

AND the said *C.* by his attorney
comes and defends the force and injury
when, &c. and says, that he never was bailiff
of the said *A.* of the goods, wares and mer-
chandizes afore said of the said *A.* nor of any
parcel thereof, in form as the said *A.* has above
declared against him; and this he is ready to
defend against him and his suit, as the court of
our lord the king here shall consider; Therefore
it is considered, that the said *C.* wage to him
thereof his law, himself being the (a) twelfth
hand, pledges of the law, *John Den* and
Richard Pen, and come with his law here on
next after the morrow of *All Souls*:
And it is told to the said attorney of the
said *C.* that he have then here at the same

Judgment,
that the de-
fendant wage
his law.
(a) By *M. C.*
9 *H. 3. c. 28.*
wager of law
shall not be
required with-
out witness.

la debt, if the defendant wage his law, the oath of the eleven, which
are sworn *de credulitate*, may be dispensed with by the plaintiff's assent.
1 *Venf. 4.*

day

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day the said C. in his proper person, to perfect his said law *Friday next after the morrow of All Souls in the year* of, &c.

— next after, &c.

B. } It is ordered, that a nonprofs be re-
against }
D. } corded on the motion of Mr.

Defendant
perfects his
law, and
judgment for
him.

AND the said defends the force and injury when, &c. and says, that he does not owe the said A. B. the said pounds, nor any penny thereof, in manner and form as the said A. B. has above complained against him; and this he is ready to defend against him and his suit, in such manner as the court of our lord the king here shall consider. It is therefore considered, that the said defendant wage to him his law, himself being the twelfth hand, and come with his law before the lord the king at *Westminster* on next after pledges of the law, *John Doe* and *Richard Roe*. And it is told to the attorney of the said defendant, that he have before our lord the king at that day the said C. D. in his proper person to perfect thereupon his law, &c. The same day is given to the said A. B. at the same place. At which day before our lord the king at *Westminster* came as well the said A. B. by his attorney aforesaid, as the said C. D. in his proper person; and upon this the said C. D. perfected thereof his law, himself being the twelfth hand, as he has above waged it. It is therefore considered, that the said A. B. take nothing by his said bill, but for his

his false complaint be in mercy, and that the said C. D. go thereupon without day, &c.

When plaintiff is nonsuit.

IF the plaintiff be nonsuited, then say, The said C. D. came in his proper person, and the said A. B. although at the same day solemnly required, came not, nor did he further prosecute his said bill against the said C. D. therefore, &c. Judgment and costs as in a common nonsuit.

Where defendant perfects his law instanter.

AFTER the judgment for the defendant to wage his law say: And upon this the said C. D. prays, that he may be admitted to wage his law thereupon instantly, and he is admitted, &c. and upon this the said C. D. here in court perfected his law thereupon, &c. It is therefore, &c.

Audita querela.

[IN what case it lies.] *Audita querela* is a writ that lies where one is bound in a statute merchant, statute staple or recognizance, or where judgment is given against him for debt, and his body in execution thereupon; then if he have a release or other matter sufficient to be discharged of execution, but hath no day in court there

An heir may maintain an *audita querela* on a judgment paid by his ancestor, who died without having taken a release or to deed upon the payment.

(a) This writ issues out of chancery, and is directed to the judges of this court, or of the C. P. and is in the nature of a commission to the judges to call the parties before them, hear the complaint, and to do right.

It lies for bail, where there is no *ca. sa.* sued out against the principal in his life-time.

Audita querela lies for bail after the reversal of the judgment against the principal.

If debt be brought on a judgment, and judgment be obtained thereupon, and afterwards the first judgment is reversed on a writ of error brought in the exchequer chamber, an *audita querela* may be brought for relief against this second judgment.

Action against *A.* for a trespass committed by him *simul cum B.* and judgment thereupon, and afterwards the plaintiff release *B.* *A.* may have an *audita querela* on this release.

A. taken in execution, is afterwards set at large by plaintiff, and taken again upon the same execution, *A.* may bring *audita querela* to be enlarged; for the execution being once discharged, supposes a satisfaction.

If after a verdict for plaintiff, and before day in bank, he release to defendant all actions and demands, but afterwards prays judgment, and sues out execution, the defendant may have an *audita querela* upon that release.

Where an audita querela lies not.] It lies not after judgment upon a matter, which might have been pleaded before. But where the party was condemned, and has no day in court to plead it, an *audita querela* lies.

Where

Where defendant had matter, which might have been pleaded to a *scire facias*, and he has lost the benefit of that by an award of execution upon a *scire feci* returned, he can never take advantage of that.

But where it is an award on two *nibils* returned, he may have an *audita querela*, and the court will save him that trouble, and relieve him upon motion, unless the ground of his *audita querela* be a release, or some matter of fact, as may be tried.

Allowance of an audita querela.] No writ of *audita querela* for any cause whatever shall be allowed but in open court. *Rule, T. 9 Jac. 1.*

Bail on audita querela.] One in execution See *Cartb.* may be bailed on an *audita querela*, on procuring four persons to become bail for him. 278.

Bail must be taken in open court, and by special motion. *Rule, T. 9 Jac. 1.*

Process in audita querela.] If an *audita querela* be founded upon a record, or the party be in custody, the process upon it is a *scire facias*; but if it be grounded on a matter of fact, or the party be not in custody, and only brought *quia timet*, the process is a *venire* and distress infinite.

This writ no superseas.] And therefore execution may be taken out, unless a *superseas* be sued forth; and if the *audita querela* be founded on a deed, it must be proved in court before a *superseas* shall be granted.

Plaintiff

Plaintiff nonsuited.] If the plaintiff in an *audita querela* be nonsuited, though he may have a new writ of *audita querela*, he shall have no *superfedeas* to stay execution.

Costs.] No costs or damages can be given to a plaintiff on the writ of *audita querela*. *Vide Dyer 194.*

Restitution in audita querela.] 2. Whether plaintiff in an *audita querela*, if it be found for him, shall have restitution, or no.

N O T E S.

1. *Audita querela must be brought where the case is doubtful.* The plaintiff's testator obtained judgment, which after his death was revived by two *scire facias*'s with *nichils* returned; and the defendant being taken in execution, moved to be discharged upon producing a release from the testator, and a rule was made for the plaintiff to shew cause. Upon shewing cause it appeared very doubtful, whether the release was executed by the testator. Insisted, that though when the *scire facias* is not served, the court will in a clear case relieve the party upon motion, and not put him to bring his *audita querela*, yet they will never do it, where the fact is disputed. And so the court agreed, but then they would have had the plaintiff consent to try it in a feigned issue, the defendant lying actually in execution, which

the plaintiff, who was an executrix in trust, refusing to consent to, the court refused to do any thing upon the motion, and left the defendant to his *audita querela*. M. 17 G. 2. *Milford Executor v. Cordwell*, 2 Str. 1198.

2. Where two nichils are returnable on a *scire facias*, the court will relieve on motion, if the party applies in a reasonable time, and not put the party to an *audita querela*. T. 10 G. 2. *Wharton v. Richardson, Widow*, 2 Str. 1075.

Bail-piece on an *audita querela*.

term in the ——— year of king George the second.

Marshalsea, to wit, A. B. of, &c. is delivered on bail to prosecute with effect a writ of *audita querela* brought by him to be discharged of and from a judgment given against him in the court of our lord the king before the king himself, at the suit of one C. D. for ——— pounds of debt, and for damages, costs and charges, to

I. P. attorney. E. F. of, &c. esq.
G. H. of, &c. gent.
I. K. of, &c. gent.
and
L. M. of, &c. gent.

Entry of the surmise and recognizance on a writ of *audita querela*.

OUR lord the king gave in charge to his justices assigned to hold pleas before the

The present Practice of the

king himself, his writ close in these words, to wit, *George the second*; &c. (here insert the whole writ of *audita querela*).

Defendant brought to the bar of the court in custody.

Defendant surmises, that he rendered himself in execution, and was committed.

Voluntary escape.

Afterwards, to wit, on the day of the same term before our lord the king at *Westminster* the said *T. S.* comes in his proper person, being brought to the bar here under the custody of esq; marshal of the *marshalsea* of our lord the king, and says, that he ought not to be further detained in the said prison by pretence of the said execution, because he says, that after the said judgment was given against him, the said *T. S.* at the suit of the said *T. H.* for the debt and damages aforesaid, he the said *T. S.* (on such a day) in the year of the reign of our sovereign lord *George the second*, now king of *Great Britain*, and so forth, in the court of our lord the king, before the king himself, the said court being then at *Westminster* in the county of *Middlesex*, rendered himself to the prison of the marshal of the *marshalsea* of our said lord the king, for the said debt and damages, and he the said *T. S.* then and there present in the said court, was by the said court of our said lord the king committed to the custody of then marshal of the *marshalsea* of our said lord the king before the king himself in execution, for the said debt and damages, there to remain until the said *T. H.* should be fully satisfied of the debt and damages aforesaid. And afterwards, to wit, on the day of then next ensuing the said (the marshal) permitted him the said *T. S.* being in prison in execution for the said debt and damages, as aforesaid, to escape out of the said prison, and to go at large, whereby the said *T. S.* was discharged from the said execution,

tion; and the said T. S. being discharged from the said execution in form aforesaid; the said T. H. afterwards, to wit, on the day of in the year aforesaid at B. in the county aforesaid, caused him the said T. S. to be taken by pretence of the said judgment, and to be committed to the custody of the marshal of the *marshalsea* of our said lord the king in execution for the said debt and damages, and the said T. S. prays, that he may be discharged from the said prison, and of the said debt and damages, and so forth; but because it is unknown to our court before us, whether the allegation of the said T. S. be true or no, it is commanded to the sheriff of *Middlesex*, that by good and lawful *Scire facias* men, and so forth, he make known to the said awarded. T. H. that he be before our lord the king from the day of *Easter* in fifteen days, wheresoever we shall then be in *England*, to shew if any thing he has for himself or knows to say, why the said T. S. ought not to be discharged and delivered from the said prison, and of the said debt and damages, and so forth, and further to do and receive what, and so forth. The same Bail. day is given to the said T. S. and so forth. And upon this came E. and B. bail in their proper persons, and became bail for the said T. S. to have his body before our lord the king at the same time, and so forth, and so from day to day until; and so forth, each of the said bail, under the penalty of 104*l.* which said sums the said bail acknowledged, and each of them by himself acknowledged to be made of their and each of their lands and chattels, and to be levied to the use of the said T. H. if it should happen, that the said T. S. should not personally appear on the premisses at any day appointed or to be ap-

Return of
scire facias.

pointed for him, by the court of our lord the king now here, or shall not prosecute his said writ with effect; or if it happen, that judgment be given for the said T. H. against the said T. S. and so forth, he do not render himself on that occasion to the prison of the marshal of the *marshalsea* of our said lord the king before the king himself, and so forth, or do not pay the said one hundred and four pounds to the said T. H. and be it known, that the writ of our lord the king in this same term before our said lord the king at *Westminster* is delivered of record to the under sheriff of the county of *Middlesex*, present here in court, to be executed in form of law, and so forth. At which day before our lord the king at *Westminster* the said T. S. came in his proper person, and the sheriff returned, that he had made known to the said T. H. by I. D. and T. F. good, and so forth, which said T. H. according to the notice given him in this behalf on the fourth day of the plea being solemnly required, also came in his proper person, and thereupon prays a day to imparle and it is given to him, and so forth; and upon this a day is given to the said parties, to be before our lord the king on the morrow of the *Holy Trinity*, wheresoever, and so forth, to wit, to the said T. H. to imparle and then to answer, and so forth; and upon this came, and so forth, and became bail to have the body of the said T. S. before our lord the king on the morrow of the *Holy Trinity*, wheresoever, and so forth, and so from day to day until, and so forth, each of the said bail body for body, and so forth.

Another

Another form of an entry of the recognizance on an audita querela.

AND upon this before our lord the king at Westminster came *A. B. C. D. E. F.* and *G. H.* in their proper persons, and became bail to have the body of the said *I. K.* before our lord the king at the same time, and so from day to day, until, and so forth, and that the said *I. M.* shall prosecute his said writ of *audita querela* with effect, each of the said bail, under the penalty of the several condemnations aforesaid; and further if it happen, that judgment be thereupon given against the said *I. K.* then the said manucaptors grant, and each of them for himself grants, that the said several debts and damages be made of their and each of their lands and chattels, and be levied to the use of the said *L. M.* if it happen that the said *I. K.* does not satisfy him the several debts and damages.

Judgment on an audita querela after verdict on a trial at bar,

FROM which day the said jury between the said parties on the plea aforesaid were thereupon respited between them before our lord the king until on the morrow of the *Holy Trinity* then next ensuing, wheresoever, and so forth, for defect of jurors, and so forth; on which morrow of the *Holy Trinity* before our lord the king at Westminster came as well the said *A. B.* in his proper person, as the said *C. D.* by his attorney aforesaid; and the jurors of the said jury being

G g 3

required,

The present Practice of the

required, likewise came, who to say the truth of and upon the premisses being chosen, tried and sworn, say upon their oath, that the said esq; late Sheriff of the county of _____ permitted the said *A. B.* to escape and go at large out of the said prison in manner and form as the said *A. B.* in his discharge of the said execution alledged. Therefore it is considered, that the said *C.* be entirely barred from all execution whatsoever, by pretence of the said recovery, and that the said *A. B.* be discharged from the said execution, and so forth.

The like in another form.

IT is therefore considered, that the said plaintiff be discharged from the execution of the said debt and damages, and be delivered out of the prison, in which he is detained on that account, and so forth.

The like in another form.

IT is therefore considered, that the said *C.* have no further execution against the said *A.* or against any of the lands, tenements, goods or chattels of the said *A.* by pretence of the said recognizance, and that the said *C.* be entirely barred from having any execution thereupon by pretence of the said recognizance, and the said *A.* and all his lands, tenements, goods and chattels be entirely discharged from such execution, and so forth.

Pauper,

NONE to be admitted *in forma pauperis* out of court. See *Rule, Hil. 3 & 4 Jac. 2.*

But now if a *pauper* make affidavit, that he is not worth 5*l.* and annex the same to a petition to the chief justice with counsel's hand thereto, he may be admitted out of court.

N O T E S.

1. The plaintiff sued as *pauper*, and was nonsuited, after which he brought a second action, and recovered. Moved on behalf of defendants, that the costs in the first action might be deducted out of the recovery in the second; but it was refused. *Hil. 4 G. 2. Butler v. Inneys & anr, Str. 891.*

2. On a motion to stay the plaintiff's proceedings as a *pauper*, till he paid costs in a former action, wherein he was nonsuited, it appeared, that the nonsuit was upon a slip of the attorney's, and not upon the merits of the cause; which the defendant might have gone into notwithstanding, if he would. The court thought this not vexatious, and therefore refused to stay proceedings. *M. 4 G. 2. Winter v. Slow, Str. 878.*

3. *Cur.* refused to make a rule to tax costs on a *pauper's* bringing a *second* ejectment, he not appearing to have been vexatious. *M. 13 G. 2. Brittain v. Greenville, 2 Str. 1121.*

(a) How to
admit a guar-
dian for an
infant before
a judge, see
53.

A petition to assign an infant a guardian (a).

In the king's bench.

*A. B. and C. D. plaintiffs,
against
E. F. defendant.*

To the right honourable *Wm. Lord Mansfield*,
lord chief justice of *England*.

*The humble petition of A. B. and C. D. infants,
under the age of 21 years, the plaintiffs in
this cause,*

Sheweth,

THAT your petitioners have, as they are
advised, good cause of action against the
defendant *E. F.* for entering into and taking
the mesne profits of a messuage, &c. [here set
forth the premises] belonging to your peti-
tioners, the possession whereof your petitioners have
lately recovered against him the said *E. F.* on an
ejectment upon their demise, and that your pe-
tioners have lately brought this action against
the said defendant in this honourable court for
such entry and taking the said mesne profits;
but your petitioners being infants, therefore,

Your petitioners humbly pray, that your
lordship would be pleased to assign
G. H. esq; for their guardian to pro-
secute this suit against the defendant,
and your petitioners shall ever pray, &c.

*A. B.
C. D.*

The

The guardian's consent to be wrote under
the petition.

I do hereby accept and agree to be a guardian to the above plaintiffs *A. B. and C. D. infants*, if this honourable court shall think fit, according to the prayer of the above petition. Witness my hand, the day of 1760.

G. H.

*Affidavit of signing the petition and consent
by the infants and guardians.*

In the king's bench.

*A. B. and C. D. plaintiffs,
against
E. F. defendant.*

I. K. of, &c. gentleman, maketh oath, that **A. B.** and **C. D.** (the petitioners named in the petition hereunto annexed, and plaintiffs in this cause) on the day of 1760. did duly sign the petition hereunto annexed in this deponent's presence, and this deponent saith at the same time, he was present and did see **G. H.** the person mentioned in the said petition, duly sign the acceptance or agreement thereunder written, in order to his being assigned a guardian to the said **A. B.** and **C. D.** according to the prayer of the annexed petition.

Sworn, &c.

I. K.

NOTES.

NOTES

1. If an infant declares by guardian or *prochein amy*, the defendant is not compellable to plead until the plaintiff produces a rule of court admitting him to declare by *prochein amy* or guardian.

2. If an infant be sued, he cannot regularly plead by guardian until admitted so to do by some judge of the court, and such admittance made a rule of court. But if he should, it is only a *misdemeanor in the attorney*, but not error. See p. 53.

For more, see *antea*, p. 19, 20, 53, 54, 55, note 4.

Privilege of parliament.

HOW to proceed against persons intitled to privilege of parliament, see *stat. 12, 13 W. 3. c. 3. stat. 11 G. 2. c. 24.*

Summons against a member of parliament.

GEORGE, &c. To the sheriff of *Middlesex*, greeting. We command you, that you cause to be summoned *A. B. esq;* he having privilege of parliament, that he be before us at *Westminster* on next after to answer *C. D.* in a plea of trespass on the case, to the damage of the said *C.* of pounds; and have there then this writ. Wit-
ness

pefs Wm. Lord Mansfield at Westminster the
day of _____ in the _____ year of
our reign,

Lee and Antonie,

Of poundage due to sheriffs, &c. on executions.

ANY sheriff, under-sheriff, bailiff of liberties, their officers, servants or deputies, by colour of their office may take for the serving of any extent or execution upon the body, lands or goods 12d. for every 20s. where the sum exceeds not 100l. and 6d. for every 20s. above 100l. that he shall levy and deliver in execution, or the body taken in execution for. — Every sheriff, &c. acting contrary shall forfeit to the party grieved his treble damage, and 40l. one moiety to the queen, and the other to the party that will sue for the same. *Stat. 29 (a) Eliz. c. 4. (a) Should be 28.*

This act not to extend to any fees to be taken for any execution within any city or town corporate. *Same stat. sect. 2.*

Although it be provided by this clause, that this act

shall not extend to the sheriffs of cities or corporations, yet it was held, that it was only to be intended for the executing judgments in the courts of the said corporations, and not to the sheriffs of cities or corporations, for the executing judgments out of superior courts. *Cro. Car. 287.*

On writs of seisin or possession sheriffs, &c. to be allowed 12d. for every 20s. of the yearly value (rent) of the lands, whereof possession or seisin shall be given, where the whole exceeds not the yearly value of 100l. and 6d. for every 20s. above the yearly value of 100l. *Stat. 3 Geo. 1. c. 15. sect. 16.*

Sheriffs,

Sheriffs, &c. taking poundage for executing any writ of *capias ad satisfaciendum*, or charging Since the *stat.* any person in execution by virtue of such writ 29 *Eliz. c. 4.* for any greater sum than the real debt amounts the sheriff, &c. to, and which is to be marked on the back of hath been the writ, to forfeit on conviction to the party allowed a fee upon executing a *ca. sa.* grievous treble damages, and double the sum extorted, to be decreed by the court, out of which such writ issued, on complaint and proof of such extortion, in such summary way as to the court shall seem meet; and every person so offending to forfeit 200*l.* one moiety to the king, the other to such as shall sue in any court at *Westminster*; such suit to be commenced within two years after the offence. *Stat. 3 Geo. I. c. 15. sect. 17.*

NOTES.

Since *statute 29 Eliz. c. 4. f. 1.* it hath been usual to take a fee upon a *ca. sa.* and if there be a second execution, as where the party dies in execution, and a *fi. fa.* issues, the sheriff ought to have a fee on such second execution, and an action of debt will lie for his fee, for the law permitting him to take it, makes it a duty. *Show. 363. Salk. 331, 333.*—But he cannot take a bond for his fees; for under colour thereof he may so have double fees. *Cro. Car. 287.*

2. For fees of executing an *elegit* debt lies, for *per Holt Ch. J.* there is the same reason for fees for executing an *elegit* as an extent. *Salk. 333.*

3. Resolved, that the *stat. 29 Eliz. c. 4.* does not extend to *real* executions, but only to executions in *personal* actions; therefore it does not extend

extend to an *habere facias seisinam*, or, *possessionem*.
Cro. Car. 331. But see *stat. 3 G. 1. c. 15. s. 16.*
antea.

4. The *stat. 29 Eliz. c. 4.* does not extend to executions upon statutes-merchant, recognizances, &c. Cro. Car. 332.

5. If an erroneous writ be delivered to the sheriff, and he executes it, he shall have his fees, though the writ be erroneous. Cro. Car. 332.

6. Sheriff cannot refuse to obey process for non-payment of fees. Str. 1262. — See p. 355. note 8. this work.

Venire by proviso.

AFTER the words, *Have put themselves upon that jury*, add, *Provided always, that if two writs shall come to you, you shall execute and return only one of them; and have, &c.*

In Lilly's Entries 676. it is said, these words are to be put in the distr. after

plur. default: and not in the venire. See *stat. 7 & 8 W. 3. c. 32.*

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F I N I S.

